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ONTARIO LABOUR RELATIONS BOARD REPORTS

May/June 1996



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Bimonthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1996] OLRB REP. MAY/JUNE

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
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0130-96-R Communications, Energy & Paperworkers Union of Canada (CEP), Applicant v. BASF Canada Inc., Responding Party

Bargaining Unit - Certification - Practice and Procedure - Subsequent to representation vote in certification application, objecting employees writing to Board to assert that they should not be included in the bargaining unit - Objecting employees raising community of interests concerns - Board concluding that objecting employees raising no allegations which, even if proved true, would change result of application - Accordingly, Board issuing final decision without a hearing - Certificate issuing

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *O. R. McGuire* and *D. A. Patterson*.

DECISION OF THE BOARD; May 16, 1996

1. Pursuant to the Board's direction of April 15, 1996, a representation vote was taken on April 24, 1996.

2. The Board has received representations from 4 objecting employees, one dated April 26, 1996 and three dated May 2, 1996. One of the letters dated May 2, 1996 was filed on behalf of nine (9) individuals.

3. For a variety of reasons the objecting employees assert that they should not be included in the union. None of the individuals assert that they should be excluded pursuant to section 1(3)(b) of the *Labour Relations Act, 1995* (the "Act") because they exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations. It is clear that many of the objecting employees do not want to be part of the union and do not think they should be included in the bargaining unit. Some of the individuals raise concerns that relate to what the Board has referred to as "community of interest". Community of interest is one factor looked at by the Board in determining whether a particular bargaining unit configuration would facilitate viable and stable collective bargaining, or cause serious labour relations problems. The test applied by the Board in bargaining unit determinations is that stated in *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266:

Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

4. After having given the concerns expressed by the objecting employees careful consideration and applying the above noted test, we are of the view that the objecting employees have raised no allegations which, even if proved true, would change the result of the application.

5. For these reasons, the Board will issue a final decision in this matter without a hearing.

6. Having regard to the agreement of the parties, the Board finds that:

all employees of BASF Canada Inc. in the City of Windsor save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and those persons for whom any trade union held bargaining rights as of April 11, 1996,

constitute a unit of employees of the responding party appropriate for collective bargaining.

7. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.

8. A certificate will issue to the applicant.
 9. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.
 10. Meeting and hearing dates set previously are hereby cancelled.
 11. The responding party is directed to post copies of this decision immediately, adjacent to all copies of the "Notice of Vote and of Hearing" posted previously. These copies must remain posted until the date that had been set for the hearing.
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4176-95-U Blythonge Developments Inc., Applicant v. Labourers' International Union of North America, Local 183, Responding Party

Construction Industry - Picketing - Strike - Threat to picket employer's worksite constituting threat to call or authorize unlawful strike for purposes of the Act - Ally doctrine not applying to facts before the Board - Declaration and cease and desist order issuing

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *D. Cowling, W. Thornton, A. Taylor* and *P. Macarz* for the applicant; *S.B.D. Wahl* and *R. Lotito* for the responding party.

DECISION OF THE BOARD; May 8, 1996.

I. Introduction

1. This is an application for a declaration or direction under section 144 of the *Labour Relations Act, 1995*. By way of Board endorsement dated March 21, 1996, as varied by a subsequent Board endorsement dated March 22, 1996, I made the following findings, declarations and directions:

1. Having regard to the evidence before the Board, I am satisfied that the responding party, Labourers' International Union of North America, Local 183 (hereinafter "Local 183") has violated section 81 of the *Labour Relations Act, 1995* (hereinafter "the Act") in that it has threatened to picket the applicant's work site, and that such a threat constitutes a threat to call or authorize an unlawful strike for the purposes of the Act.
2. Pursuant to the Board's remedial authority provided by section 144 of the Act, the Board:
 - (a) finds and declares that Local 183 has violated section 81 of the Act;
 - (b) directs Local 183 to cease and desist from violating section 81 of the Act at or in relation to the applicant's project at 2727 Yonge Street, Toronto, Ontario; and
 - (c) directs Local 183, and any other person having notice or knowledge of this direction, to cease and desist from engaging in an unlawful strike or authorizing, threatening to call or encouraging an unlawful strike, or from doing any act, the probable consequence of which is that another person or persons will engage in an unlawful strike in relation to the applicant's project at 2727 Yonge Street, Toronto, Ontario.
3. Reasons for this decision will issue at a later date.

These are the reasons for the above decision.

II. Factual Background

2. This application came on for hearing on March 20, 1996. During the course of the hearing, the Board heard testimony from Walter Thornton, counsel for the applicant, Blythyonge Development Inc. (the latter entity referred to at times in this decision as “Blythyonge”), and from Mr. Philip Macarz, a Vice-President of the Philmor Group, with which Blythyonge is affiliated. In lieu of testimony from Local 183, the parties stipulated four facts for the purposes of this application.

3. Blythyonge is engaged as a developer/general contractor of a residential condominium project located at 2727 Yonge Street, Toronto, Ontario (hereinafter referred to at times in this decision as “the project” or “the site”). Blythyonge is bound to a collective agreement with Local 183, which is and was in effect at all material times, and which governs the terms and conditions of employment of labourers employed by the applicant.

4. The allegations of an unlawful strike made by Blythyonge stem from a lawful strike, which commenced in late January, 1996, and which was in effect at the time of the litigation of this proceeding, between Masonry Contractors’ Association of Toronto Inc. (hereinafter referred to as “M.C.A.T.”) and The Bricklayers, Masons Independent Union of Canada, Local 1 (hereinafter referred to as “Local 1”). This strike, which has affected residential construction in Board Area 8, was ongoing at all material times for the purpose of this application. The original masonry contractor on the applicant’s project was Gottardo Contracting (1980) Inc. (hereinafter referred to as “Gottardo”), a member of M.C.A.T. Accordingly, Local 1 was at all material times in a legal strike position with respect to Gottardo.

5. On February 16, 1996, counsel for the applicant, Mr. Thornton, wrote to Mr. Rocco Lotito, a business representative of Local 183, after receiving a telephone call from Mr. Macarz regarding a discussion Mr. Macarz had earlier had with Mr. Lotito. Mr. Macarz had earlier spoken to Mr. Lotito respecting the performance of some masonry work on the project relating to the hydro vault, and was told by Mr. Lotito that no masonry work would be undertaken at the site. Mr. Thornton’s correspondence to Mr. Lotito indicates his understanding that Local 183 was threatening to picket the project because of the presence of Gottardo at the site. He notes his understanding that the commercial agreement between Gottardo and his client permitted for the removal of Gottardo from the site, and that such removal had occurred, and invites Mr. Lotito to call him to explain any concerns regarding his client’s response to the situation. I note here that the letter was errantly sent by facsimile to the offices of the Labourers’ Ontario Provincial District Council, rather than those of Local 183, which may explain the failure of Mr. Lotito to contact Mr. Thornton regarding the situation.

6. In fact, Mr. Macarz did speak with a representative of Gottardo on February 16, 1996, and purported to verbally terminate the applicant’s contract with Gottardo in accordance with the terms of the contract. The contract for masonry work had been let in December, 1994, and Gottardo had performed some tending and mobilization work on the site prior to February, 1996. The applicant had made some efforts in early February to convince Gottardo to work on the site but Gottardo, not surprisingly, refused at that time to send workers to the site because of the legal strike by Local 1. On March 18, 1996, the applicant forwarded correspondence to Gottardo in which Mr. Macarz asserted the earlier termination of the contract by way of telephone conversation, and confirmed the grounds for the termination. It is, ultimately, unnecessary for the purposes of this proceeding to make any finding as to the effectiveness of the termination of the relationship between the applicant and Gottardo.

7. On February 26, 1996, Birch Hill Masonry (hereinafter referred to as “Birch Hill”), a non-union masonry contractor now under contract with Blythyonge, commenced work on the site. Until March 15, 1996, its presence on the project was uneventful. However, on that date Mr. Macarz received

a telephone call from his construction superintendent in which he was advised that two representatives of Local 1 were on the site, that they had notified Birch Hill to leave the site, and that they had indicated that unless Blythyonge stopped its masonry work on the site they would picket the site on the following Monday, March 18, 1996. Mr. Macarz spoke to one of the two individuals from Local 1 (who the parties agreed were Mr. Dino Puppi and Mr. Mario Moschella, Business Representatives of Local 1), and indicated that he thought that correspondence between Mr. Lotito and Mr. Thornton had resolved this problem. Mr. Macarz called Local 183 to clarify the situation, left a message, and received a telephone call shortly thereafter from an unidentified individual who advised him that Mr. Lotito had stated that if Blythyonge continued to use non-union masonry contractors, there would be a picket line at the project on Monday. Mr. Macarz thereupon called Mr. Thornton.

8. After speaking to his client, Mr. Thornton subsequently spoke to Mr. Lotito regarding the situation. The thrust of these discussions was that Mr. Lotito felt that the employment of a non-union masonry contractor on the site would cause some difficulties in the Local 1 negotiations with M.C.A.T. Mr. Thornton was advised by Mr. Lotito that it was reasonably probable that the negotiations would be completed within a few days. Accordingly, Mr. Thornton indicated that he would recommend to his client that no masonry work be performed on the site until further notice to Local 183, on the understanding that Local 183 would not cause a picket line or picketing to take place, and with the proviso that he would, in the meantime, bring this application to the Board. Mr. Lotito indicated his belief that such an application would be unsuccessful without actual picketing at the project. Mr. Lotito confirmed to Mr. Thornton that as soon as there was any masonry work performed on the site by a non-union contractor, there would be picketing on the site. Mr. Thornton testified that there was no doubt about this assertion by Mr. Lotito, and that he had had no subsequent conversation with Mr. Lotito in which it was suggested that Mr. Lotito's position had changed.

9. Mr. Thornton confirmed his discussion with Mr. Lotito by way of correspondence dated March 15, 1996, which was directed to the Labourers' Ontario Provincial District Council. The letter states, in part, that the applicant's decision to not perform masonry work is "in order to co-operate with Local 183", and notes that an application to the Board would be made in the event that Mr. Lotito's "negotiations with certain masonry contractors are not resolved next week". In accordance with the discussion between Mr. Thornton and Mr. Lotito, no masonry work was performed on the site subsequent to March 15, 1996, and this application was filed with the Board on March 18, 1996.

III. Legislative Provisions

10. The provisions of the Act which are of importance to the determination of this application read as follows:

- 81. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.
- 83(1) No person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.
- 83(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.
- 107(2) Any act or thing done or omitted by an officer, official or agent of a trade union or council of trade unions or employers' organization within the scope of the officer, official or agent's authority to act on behalf of the union, council or organization shall be deemed to be an act or thing done or omitted by the union, council or organization.

IV. Reasons for Decision

11. At the outset, it is critical to keep in mind that the responding party to this application is Local 183, and not Local 1. Local 1 was not provided with notice of, nor was it represented at, this proceeding. Although the underlying events leading to this application encompass the work dispute between M.C.A.T. and Local 1, the applicant has not named Local 1 or any of its officers, officials or agents as responding parties; nor has it named as responding parties Mr. Lotito or any of the other officers, officials or agents of Local 183. Accordingly, the analysis of the law and the facts of this proceeding must be made with only Local 183 as the focus, and not Local 1 or any particular individual.

12. Counsel for the parties provided the Board with comprehensive and helpful submissions on the various legal principles relating to picketing and unlawful strikes. I do not propose to set out the argument of counsel except to the extent that it is necessary to do so.

13. As a starting point, it is evident from the wording of section 81 of the Act, and from Board jurisprudence interpreting and applying predecessors of section 81, that it is a violation of the Act for a trade union to “threaten to call or authorize an unlawful strike”. Accordingly, I must consider, first, whether as a matter of fact Local 183 threatened to set up a picket line at the site and, if the answer to that question is in the affirmative, whether that conduct can be characterized as calling or authorizing an unlawful strike in the circumstances outlined above.

14. During argument, counsel referred the Board to a number of decisions dealing with allegations of threatened strikes; in particular, *Valentine Developments and Forto Forming Limited*, [1973] OLRB Rep. Oct. 537, *North Simcoe Electrical Contracting Limited*, [1973] OLRB Rep. June 336, *Maitland Redi-Mix Concrete Products Limited* [1980], OLRB Rep. Dec. 1751, and *Acme Building and Construction Limited*, [1987] OLRB Rep. Feb. 179. Each of these decisions was rendered on its own particular facts. However, some guidance can be gleaned from comments made by the Board in the cases.

15. In *North Simcoe Electrical Contracting Limited*, *supra*, the applicant, which had a valid collective agreement with CLAC, was working as a subcontractor on a construction project and persons identified as being members of the IBEW commenced a picket line protesting that non-IBEW rates were being paid to the electricians on site, as well as that the electricians were not local residents. The picketing did not deter the applicant’s employees from attending work, as there was no attempt to stop persons from crossing the line. One contractor’s employees did respect the line, but for only one day of the three day picket, a day which was abbreviated due to weather conditions. The IBEW business agent testified that the purpose of the picket line was informational, and that he had instructed the pickets not to obstruct traffic and those going to work.

16. On these facts, the majority of the Board declined to grant a cease and desist order. The Board noted that the applicant had not suffered any harm, and that there was no indication that the pickets had caused detrimental economic pressure to the applicant. It was also observed that the members of other trade unions had crossed the picket lines, and that as at the date of the application all picketing had ceased. The return of the employees to work on the project also suggested to the Board that no order need issue.

17. A different result was reached in *Valentine Developments and Forto Forming Limited*, *supra*. In that case, the Business Manager of Local 18 of the United Brotherhood of Carpenters and Joiners of America asserted that the forming work being performed on site fell within the jurisdiction of Local 18. When the employer expressed a different opinion, the Business Manager stated that, in order to stop the work from being performed by the Labourers’, he would “blanket the area with pickets even if it cost a million dollars”. It was also asserted subsequently by the Business Manager that Local

18 would obtain the support of the Hamilton District Trades Council. The Business Manager did not testify at the hearing.

18. The Board concluded that the representations made by the Business Manager constituted “a real threat” to the applicants such that picketing “could reasonably be anticipated”. The Board further concluded that the evidence before it and the jurisprudence both established the proposition that the employees engaged at the work site could be expected to honour such a picket line and that the result would be that the job would come to a stop. In the circumstances, the Board concluded that the threat made by the Business Manager constituted an unlawful strike.

19. In *Maitland Redi-Mix Concrete Products Limited, supra*, a number of statements were made by two officials of Teamsters Local Union 879 to the general contractor that picket lines would be set up at a worksite. The workers at the project were governed by collective agreements and there were no members of the Teamsters on the site. The applicant was the supplier of the ready-mix concrete to the project.

20. The Board, after discussing the *Valentine Developments* and *North Simcoe* decisions, observed that the distinction between the two cases “lies in the perception of the Board of what would probably happen in the former case as opposed to what had not happened in the *North Simcoe* case.” The Board noted that in the case before it, after a series of statements, no picket line had been established, no one had engaged in an unlawful strike, and no harm had been suffered by the applicant. In the circumstances, the application for relief was determined to be premature and was compared to a request for an injunction *quia timet*. The Board concluded its reasons by noting that “statements by the respondent that a picket line would be set up do not persuade the Board that an unlawful strike will occur at the site. The mere apprehension by the applicant that a picket line might be set up which in turn might lead to an unlawful strike is not sufficient, on the facts before the Board, to entitle the applicant to the granting of discretionary relief...”.

21. The final case referred to the Board is *Acme Building and Construction Limited, supra*. In this case, the application was based on a conversation between the applicant’s project manager and the Business Representative of the responding party trade union. The Business Representative objected to the use of a non-union painting contractor at the site in question and indicated to the project manager that, if the non-union painting contractor were used, an information picket would be set up. The Business Representative in question testified that he in fact made the statements attributed to him, but stated that he did not really have any intention to set up such an information picket.

22. The Board, in the exercise of its discretion, did not issue a cease and desist order. It was observed that the statements made on the date in question had not been made to the applicant subsequently and nothing had been done to carry through with the statement made. The Board accepted the testimony of the Business Representative that he did not, at any time, have any intention of setting up an information line or a picket line. In the circumstances, the Board was “not persuaded that there is a real or strong likelihood that picketing will occur so that the Board should exercise its discretion to grant, in effect, *quia timet* relief in respect of picketing”.

23. Turning to the instant case, Mr. Lotito did not testify on behalf of Local 183, and the testimony of Mr. Thornton and Mr. Macarz regarding their discussions with Mr. Lotito was not challenged in cross-examination. Accordingly, I accept that Mr. Lotito *did* assert that a picket line would appear at the site if Blythoyne continued to have its masonry work completed by a non-union contractor. It is significant, in light of the above authorities, that Mr. Lotito, though present at the hearing, did not testify that he did not intend to say what he said, or that Local 183 would refrain from picketing the site. When direct, credible evidence has been led supportive of one or more of the elements of a violation of the Act, and no evidence to the contrary is provided to the Board, both the

evidence and logical inferences support a finding that the events as attested to did in fact occur. At least twice during the hearing, counsel for the applicant effectively invited Mr. Lotito to testify; Mr. Lotito at no time took counsel up on his offer.

24. It is evident that Birch Hill has been performing masonry work at the site since February 26, 1996, without incident. This fact could lead one to conclude that the assertion made by Mr. Lotito was without intent. However, the lack of picketing for at least part of that time is referable to the offer made by Blythyonge, through its solicitor, to perform no masonry work pending the disposition of this application. Adding force to the statement made by Mr. Lotito is the fact, mentioned to Mr. Thornton in their conversations, that he was involved in the Local 1 negotiations with M.C.A.T.

25. On balance, and in all of the circumstances, I am of the view that the statement made by Mr. Lotito was a real threat to picket the project. The statement was made by an individual knowledgeable of the state of the current negotiations between M.C.A.T. and Local 1, and was made in the context of the ongoing legal strike. The statements were made directly to the applicant's representatives. Furthermore, there is no evidence to suggest that Mr. Lotito made the statements unintentionally or that they no longer represented his thinking as at the time of the hearing. Accordingly, I am of the view that the statements made by Mr. Lotito were a real threat to set up a picket line at the applicant's site. A reasonable person, in all of the circumstances, would have perceived a real likelihood that picketing would occur on Monday, March 18 should the non-union masonry contractor continue its work on site.

26. Counsel for Local 183 asserted that the statements of Mr. Lotito were merely statements of fact, describing the situation as it related to Local 1. That is, counsel noted that Mr. Lotito never stated that *Local 183* would picket the applicant's site, just that a picket line would be set up. That, it was submitted, is not improper, as it is merely a description of what might properly result from the lawful strike currently in effect by Local 1 against the members of M.C.A.T. I disagree with this assertion. Mr. Lotito is a business representative on behalf of Local 183, not an officer, official, or agent of Local 1. On the facts before me, I conclude that Mr. Lotito was speaking on behalf of Local 183 and was in fact threatening that Local 183 would be picketing the site. It is not, in my view, necessary for Mr. Lotito to state "I say this as a business representative of Local 183", or "Local 183 will be setting up a picket line" in order to reach an accurate conclusion respecting what entity Mr. Lotito was referring to. The conclusion to be drawn from what Mr. Lotito stated was that a Local 183 picket line would be formed at the site on Monday, March 18 if a non-union contractor were used to perform masonry work. And without attempting to be repetitive, if Mr. Lotito was really just describing Local 1's intention, or his belief in Local 1's intent, he could very easily have been sworn at the hearing to testify to that. He did not.

27. As was noted by counsel for Local 183 at the hearing, it is not necessarily a violation of the Act to threaten to picket a job site. As is apparent from section 81 of the Act, the illegality of the threat to picket is in the corresponding threat to call or to authorize an unlawful strike. As noted above in paragraph 13, this requires me to consider whether the threat of picketing the site constitutes a threat of an unlawful strike as defined by the Act.

28. A number of decisions were referred to by counsel respecting what result could reasonably be expected from Mr. Lotito's threat to have Local 183 picket the project. In *Valentine Developments and Forto Forming Limited, supra*, the Board noted the testimony of a witness to the effect that in the construction industry, one could generally expect from the establishment of a picket line that the employees engaged at the work site would honour the picket line, and that the job would come to a halt. A number of Ontario Supreme Court decisions were cited which have accepted this proposition (see, for example, *Smith Brothers Construction Company Limited v. Jones et al* (1955), 55 C.L.L.C.

para. 15,212). The Board has, subsequently, taken notice of this fact. In *Horton CBI, Limited*, [1985] OLRB Rep. June 880, the Board made the following observation at paragraph 16:

It has long been recognized in this Province that the affiliated building trades of the construction industry can be expected to, and do, respect each others picket lines, without having to be expressly "told" to do so. That probability has been recognized both in practice and in law ... The fact is that, regardless of the nature of the labour dispute or the details of the information conveyed by the picket signs (and here the signs themselves were rather cryptic), picketing at a construction site has a collateral purpose: to induce other employees in sympathy with the picketers to refrain from crossing the picket line and going to work, as scheduled. The message is "don't cross", which, in effect, usually means "engage in a sympathy strike which will put pressure on the firm with which we have a dispute".

See also *Acme Building and Construction Limited*, [1984] OLRB Rep. Aug. 1037, at paragraphs 4 and 5.

29. I agree with the observations made in the above decisions. A picket line established by Local 183 at the site would have had the effect of causing its members to refuse to work on the site. It cannot be denied that the concerted refusal by Local 183 members on the site to not attend for work because of the picket line would be a strike for the purposes of the Act. Such a strike, in the absence of some lawful justification, would clearly constitute an unlawful strike for the purposes of section 81 of the Act. Undoubtedly Mr. Lotito would have been well aware of that fact. It could hardly be expected that Local 183 members would cross the picket line. In the result, it is apparent that Mr. Lotito, on behalf of Local 183, threatened to call or authorize a strike of Local 183 members when he made the comments he did to the applicant's representatives. The remaining question to be considered is whether there is any lawful justification for so doing.

30. In my view, no such justification has been established in the circumstances of this case. At all relevant times Local 183 was not in a legal strike position with regard to Blythynge or Gottardo; the collective agreement with regard to the former is still in effect, and Local 183 has absolutely no bargaining relationship with respect to Gottardo. Quite simply, there is no provision of the Act which makes either strike action or threatened strike action by Local 183 legal as it relates to Blythynge or Gottardo.

31. In that regard, counsel for Local 183 relied upon, and directed legal argument towards, section 83 of the Act, which is reproduced below:

- 83(1) No person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.
- 83(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

In essence, counsel relied upon the "ally doctrine", and the fact that Birch Hill was performing "struck work", to establish the lawfulness of the conduct of Local 183.

32. It is not evident to me that the "ally doctrine" has any application to these facts, keeping in mind that it is Local 183 which is the focus of this application. On the facts, there is no question that Local 183 was not in a legal strike position vis-a-vis Blythynge. Assuming, for the purposes of argument, that Blythynge and/or Birch Hill were "allies" of Gottardo, that relationship would not cause an otherwise unlawful strike by Local 183 to become lawful. Quite simply, Local 183 cannot avail itself of the "ally doctrine" on the facts of this case. Further, this argument must also fail for the simple reason that section 83 of the Act does not apply to trade unions. In *Consolidated-Bathurst*

Packaging Limited, [1982] OLRB Rep. Sept. 1274, the Board considered the applicability of the predecessor provisions to section 81 and 83 and in that regard made the following observations at paragraph 20:

Section [81] only refers to a trade union in the context of the prohibition against the calling or authorizing or threatening to call or authorize an unlawful strike. None of the trade unions named in this application could call or authorize an unlawful strike of the applicant's employees within the meaning of that section in our view. None of the trade unions represented such employees and the establishment of picket lines, while provoking or causing an unlawful strike cannot be characterized as an act of calling or authorizing. To this extent we agree with the respondents that calling or authorizing an unlawful strike suggests that the trade union in question has authority over the employees who are engaging in an unlawful strike. The C.P.U. and the E.C.W.U. have no such authority. *Similarly, section [83] cannot be breached by a trade union in that it directs that "no person shall" and, in the context of this legislation, the term "person" is not a reference to a trade union ...* [emphasis added]

If section 83(1) of the Act cannot be breached by Local 183, then the doctrines or principles established by the Board pursuant to section 83(2) of the Act to legitimize certain strikes called, authorized, or threatened by a trade union cannot apply to Local 183.

V. Conclusion

33. For the reasons referred to above, the findings, declarations and directions set out above in paragraph 1 were made on March 22, 1996.

1770-87-JD Boise Cascade Canada Ltd., Applicant v. International Association of Machinists and Aerospace Workers, Local 771 and International Brotherhood of Electrical Workers, Local Union 1744, Responding Parties

Jurisdictional Dispute - Remedies - Employer and unions disputing assignment of certain instrumentation work - Employer asserting that demarcation line in collective agreements requiring it to assign pneumatic instrumentation to Machinists' union and electronic instrumentation to IBEW no longer rational given technological and equipment changes occurring within last decade - Employer submitting that splitting instrumentation work between two groups of employees leading to considerable inefficiencies - Board rejecting unions' argument that Board without jurisdiction where unions not making competing claims for disputed work - Board confirming employer's assignment of pneumatic instrumentation to IBEW - At employer's request, Board directing that unions share jurisdiction over pneumatic instrumentation on interim basis

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *H. Kobryn* and *Janet Trim*.

APPEARANCES: *Peter J. Thorup* for the applicant; *Lorne Richmond* for the I.A.M.; *S.B.D. Wahl* for the I.B.E.W.

DECISION OF THE BOARD; May 23, 1996

1. This is an application filed by Boise Cascade Canada Ltd. ("Boise") under section 91 [now section 99] of the *Labour Relations Act, 1995*.

2. The work assignment dispute which generated this application was initiated when Boise assigned certain instrumentation work which had previously been performed exclusively by members of the International Association of Machinists, Local 771 ("the I.A.M.") to members of the International Brotherhood of Electrical Workers, Local 1744 ("the I.B.E.W."). The I.A.M. and I.B.E.W. collective agreements with Boise dictate that members of the I.A.M. perform pneumatic, hydraulic or fluidic instrumentation work (hereafter referred to as "pneumatic instrumentation") and that members of the I.B.E.W. perform electrical and electronic instrumentation work (hereafter referred to as "electronic instrumentation"). Boise claims that this demarcation line is no longer a rational one given the technological and equipment changes that have occurred within at least the last decade. Boise submits that splitting instrumentation work between two groups of employees leads to considerable inefficiencies and other problems affecting Boise's ability to compete. It is this view that caused Boise to assign pneumatic instrumentation to members of the I.B.E.W. in 1987. Boise requests that the Board direct the maintenance, repair and installation of all instrumentation work performed by Boise employees be assigned to members of the I.B.E.W. or, alternatively, that pneumatic instrumentation be shared on an interim basis by members of both the I.A.M. and I.B.E.W. The I.A.M. and the I.B.E.W. take the position that Boise is not entitled to the relief it requests and that this application should be dismissed.

3. This application does not represent the first occasion these parties have had a dispute concerning the assignment of instrumentation work. Before addressing a preliminary issue raised by the responding parties and the merits of the application, the Board will review some events which preceded this application as well as some of the history of this application. In making its factual determinations, the Board has considered the facts agreed to by the parties, the documentary evidence, the evidence of Jim Gartshore, Maintenance Manager of Boise's Fort Frances mill, and the submissions of the parties relating thereto. The Board notes that the I.A.M. and the I.B.E.W. did not call any evidence on the merits of the application.

BACKGROUND AND HISTORY OF THIS APPLICATION

4. Boise operates 8 pulp and paper mills in the United States and it operates mills at Kenora and Fort Frances, Ontario, the latter mill being the subject of this application. Boise is bound to 4 mill collective agreements at Fort Frances. The Fort Frances and Kenora collective agreements have common expiry dates and are negotiated through multi-union central bargaining. Out of the approximately 700 employees at the Fort Frances mill, 180 employees are covered by the I.A.M. collective agreement and 38 employees are covered by the I.B.E.W. collective agreement. Approximately 8 of the I.A.M. members are primarily involved in pneumatic instrumentation work and approximately 8 I.B.E.W. workers are involved in work on electronic instrumentation and electronically distributed control systems.

5. During the early years of the its operation, equipment in the Fort Frances mill was activated or controlled by pneumatic, fluidic or hydraulic systems. These systems were maintained by employees who were members of the International Brotherhood of Firemen and Boilers, Fort Frances, Local 146 ("Local 146"). The bargaining rights of Local 146 were terminated just prior to 1970. In a 1970 proceeding before the Board, the I.A.M. and the I.B.E.W. both applied to represent employees engaged in pneumatic instrumentation work. The Board determined that instrument mechanics did not constitute a craft bargaining unit. The Board certified the I.A.M. for a tag-end unit of "... all employees of the respondent engaged in the installation, maintenance, dismantling and assembly of pneumatic, hydraulic and fluidic instrumentation ...". Given the technology and equipment in use up until the 1980's, employees from one union were responsible for the entire instrumentation loop on virtually all systems in the mill.

6. Beginning in the late 1970's and increasingly more recently, many pneumatic instrumentation systems were being replaced or eliminated by electronic instrumentation systems. Certain components of these systems were similar to other systems maintained by members of the I.B.E.W. The new electronic instrumentation was often integrated or connected with computer systems maintained by members of the I.B.E.W. In the early 1980's, approximately 90% of the instrumentation loops required work by one member of a bargaining unit. In the late 1980's, 50% of the loops involved both pneumatic and electronic instrumentation. By the early 1990's, approximately 80% of the loops involved both electronic instrumentation and some degree of pneumatic instrumentation. Although pneumatic instrumentation will always be present, the trend towards utilization of electronic instrumentation and associated computer equipment is obvious and inevitable. With these technological developments and the existing demarcation line, Boise is often forced to assign 2 individuals to work on the same loop since the source of the problem is unknown.

7. The I.A.M., recognizing the trend in instrumentation work, sought to protect and expand its work jurisdiction. The I.A.M. wanted instrument mechanics to perform all instrumentation on certain loops. The attempt to expand its jurisdiction occurred over the course of several sets of collective bargaining negotiations in the 1980's. It also occurred when the I.A.M. filed a jurisdictional dispute application in 1984 ("the I.A.M. application"). In its application, the I.A.M. claimed jurisdiction over instrumentation work on 16 specific systems, representing a small random collection of the mill's systems. The proceeding was lengthy, undoubtedly expensive for all the parties and did little to enhance the working relationship between members of the I.A.M. and the I.B.E.W. In a decision dated May 19, 1989 [reported at [1989] OLRB Rep. May 413], the Board, at the completion of the I.A.M.'s evidence, allowed a non-suit motion and dismissed the application. The Board concluded that "the I.A.M. has not produced evidence that might even arguably lead us to grant its claim in whole or in part".

8. The application before us was filed in September, 1987, during the course of the I.A.M. application. It was adjourned pending the decision in that application. Once the I.A.M. application was dismissed, Boise requested that its application be re-listed. This application came on for hearing before Vice-Chair Petryshen and Board Members H. Kobryn and W. Gibson in October, 1989. At that time, the panel entertained a motion by the responding parties who asserted that the Board did not have jurisdiction to entertain this application. After another hearing in January, 1990 in which the Board entertained Boise's "best case", the Board issued a "bottom line" decision dated February 6, 1990 in which it decided that the Board had jurisdiction under section 91 of the Act to entertain the application and that it would be inappropriate to dismiss the application on the basis of Boise's "best case". Before the hearing continued, Mr. Gibson died and Ms. J. Trim was assigned to this case. A number of hearing days were held over a considerable period of time to deal with various issues and to give the parties the opportunity to settle the matter themselves. The panel suggested to the parties that they attempt to settle the matter both during and even after the hearing on the merits was completed. Although the parties appeared to make settlement efforts, they were unable to resolve the dispute by themselves. The nature of the issues and the strong feelings generated by the I.A.M. application were likely some of the factors which made settlement difficult. The panel had hoped that time would perhaps create conditions that would make settlement more likely. However, that has obviously not been the case.

THE PRELIMINARY ISSUE

9. As noted above, a hearing was held for the purpose of entertaining the parties' submissions with respect to the Board's jurisdiction to entertain this application. Prior to the hearing, counsel for Boise filed a document entitled *Synopsis of Submissions in respect of preliminary jurisdictional objections* ("Synopsis"). At the hearing, the parties agreed that paragraphs 1 - 25, as well as certain exhibits that were placed before us on consent, would constitute the factual context for the parties'

submissions. The agreed facts provide further details about the instrumentation dispute and the specific circumstances which gave rise to this application. Paragraphs 1-25 of the Synopsis read as follows:

INTRODUCTION

1. In Ontario, Boise Cascade Canada Ltd. ("Boise") operates pulp and paper mills at Kenora and Fort Frances, the latter mill being the subject of the proceedings in these matters. At Fort Frances, Boise is bound to collective agreements with *inter alia* the I.A.M., Lodge 771 (the "I.A.M.") and the I.B.E.W., Local 1744 (the "I.B.E.W.").

2. Of a total of approximately 700 employees at the Fort Frances mill (the "mill"), approximately 180 employees are covered by the I.A.M. collective agreement, 8 of which are primarily involved in work on pneumatic instrumentation equipment. Approximately 38 employees are covered by the I.B.E.W. collective agreement. In varying degrees, approximately 8 of the I.B.E.W. employees are involved in work on electronic instrumentation equipment.

3. Beginning in approximately the late 1920's, equipment in the mill was activated or controlled by pneumatic or hydraulic systems. As technology advanced and beginning in approximately the late 1950's, the mill began introducing electrical and subsequently electronic instrumentation equipment. In approximately the late 1970's and increasingly during the 1980's, many pneumatic systems were completely replaced or eliminated in favour of electronic systems, some of which are integrated or connected with computer systems. In addition, there has been and will increasingly be an influx of new electronic instrumentation equipment, over and above the existing mill equipment.

4. Historically, work assignments have been made on the basis that in-house installation, maintenance and repair of pneumatic, hydraulic and fluidic instrumentation has been performed by I.A.M. employees and in-house installation, maintenance and repair of electrical and electronic instrumentation including metering control instruments and certain computer systems, has been performed by I.B.E.W. employees.

5. The trend towards utilization of electronic instrumentation and associated computer equipment instead of pneumatic instruments has accelerated, particularly in view of the rapid advances in technology and the availability of sophisticated electronic equipment. Much of this new instrumentation equipment is far more versatile and compatible with other systems than was possible even a few years ago. The current electronic technology and equipment in use at the mill, such as the Bailey 90's on the Digesters and the Bleaching system, is programmed and configured to perform both sequence control and modulating control. There are a number of new electronic systems which, because of their versatility, not only replaced previous electronic systems but also at the same time now perform functions previously carried out by pneumatic systems.

HISTORY OF PROCEEDINGS

6. A Complaint under Section 91 of the *Labour Relations Act* (the "Act") by the I.A.M. in Board File No. 2747-84-JD was originally filed on or about January 7th, 1985, complaining of work assignments made in or about October, 1984 and onwards in connection with the installation of a Bailey Network 90 Micro-Processor Control System ("Bailey 90") on #7 paper machine and the replacement of an Opticlor system with a Kajanni electronic sensing system.

7. In the course of pre-hearing meetings between the parties, the Respondents in that proceeding, Boise and the I.B.E.W., advised the I.A.M. that the work claimed in the I.A.M.'s Complaint constituted a small portion of the electronic instrumentation in the mill and that if the I.A.M. was actually seeking more work than simply the Bailey 90 and the Kajanni Systems, the I.A.M. should amend its claim. The I.A.M. thus expanded its claim to a list of sixteen specific systems, almost half of which have already been replaced or integrated with other systems since the commencement of that proceeding. These "sixteen systems" represented only a small random collection of the mill's systems.

8. Following protracted and lengthy pre-hearing meetings, the parties agreed to certain procedures for the filing of documents, full particulars and extensive Briefs.

9. In its original Brief in Board File No. 2747-84-JD, Boise set out its request that the Board order all instrumentation, be it pneumatic, hydraulic, fluidic, electrical or electronic, to be assigned to the I.B.E.W. Boise's alternative request for status quo in the work assignments was expressly made without prejudice to Boise's right to apply to the O.L.R.B. in the future to request relief.

10. Throughout the proceedings in the previous Complaint, Boise consistently took the position that all instrumentation ought to be performed by one bargaining unit and in this case, the I.B.E.W. Boise consistently made it clear that the request for status quo was an alternative request whose only merit was that it was better than what would result from the I.A.M.'s request. Had the I.A.M.'s request been granted in any respect, the work jurisdictional boundaries, which were already inefficient and unsatisfactory, would have become virtually unworkable.

11. Following the filing of the Briefs by all parties, a panel of the Board consisting of Vice-Chair, R. J. Herman, and Board Members H. Kobryn and J. Wilson commenced the hearings with the I.A.M. proceeding first.

12. At the conclusion of the evidence of the I.A.M., the I.B.E.W. notified the I.A.M., Boise and the Board that it would be bringing a "non-suit" motion to have the I.A.M.'s Complaint dismissed. The Board ruled that the I.B.E.W. would not be required to be put to its election on whether or not it would call evidence.

13. The Board set aside September 9th and 10th, 1987, for hearing the I.B.E.W.'s "non-suit" motion.

14. Shortly before the scheduled hearing into the "non-suit" motion, the Board lost one of its panel members through the unfortunate death of Mr. J. Wilson.

15. Over the course of the lengthy pre-hearings and hearings into the Complaint in Board File No. 2747-84-JD, Boise continued with the historical method of work assignments based on the "pneumatic versus electronic" distinction, in the knowledge that Boise's request for a comprehensive resolution would ultimately be dealt with by the Board. Over the course of the proceedings, and particularly in view of ongoing changes in technology and equipment at the mill, it became increasingly apparent that the status quo jurisdictional lines represent an antiquated and highly inefficient method of assigning instrumentation work.

16. Even over the several years between the time of filing of the original I.A.M. Complaint and filing of the Complaint by Boise in this matter, many pneumatic systems have been replaced or combined with electronic systems. Technologically advanced equipment is continually being introduced into the mill. Capital expenditures for this new technology easily exceed \$8,000,000.00 in a relatively short period of time.

17. Once it became apparent that Boise would not have the opportunity in the course of the original I.A.M. Complaint to raise its request, Boise was left with no choice except to achieve some form of sensible work allocation and, if necessary, to seek relief in its own Complaint under Section 91 before the Board.

18. As set forth in letters dated September 22nd, 1987, to the I.A.M. and the I.B.E.W. from Jim Gartshore (Boise's Electrical and Instrumentation Superintendent), I.B.E.W. members were assigned work on all types of instrumentation be it electronic, pneumatic, hydraulic or fluidic. This did not result in the lay off of any of the 9 affected I.A.M. employees who continued to perform pneumatic, hydraulic and fluidic instrumentation.

19. Following such work assignments, the I.A.M. verbally and in writing demanded that the work be assigned to the I.A.M. and not to the I.B.E.W. In particular, an I.A.M. Union Policy Grievance dated September 23rd, 1987, was filed over such assignments.

20. Following these demands by the I.A.M. that Boise assign pneumatic instrumentation work to the I.A.M. and not to the I.B.E.W., the instant Complaint in this matter was filed with the Board by Boise in late September of 1987.

21. Boise unsuccessfully objected to the arbitrability of the I.A.M. Union Policy Grievance. In Minutes of Settlement executed between Boise and the I.A.M., Boise agreed to withdraw the above-noted work assignment. However, the parties explicitly agreed in those Minutes of Settlement as follows:

“This withdrawal of the above assignment shall in no way interfere with the jurisdiction of the Ontario Labour Relations Board in the jurisdictional dispute proceedings to decide whether the O.L.R.B. should direct that instrumentation be it pneumatic, hydraulic, fluidic, electrical or electronic, should be assigned to the I.A.M. or to the I.B.E.W. or continue to be assigned in accordance with historical practice.”

NON-SUIT MOTION IN PREVIOUS JURISDICTIONAL COMPLAINT

22. The aforementioned non-suit motion by the I.B.E.W. was ultimately heard by a panel of the Board chaired by Vice-Chair Inge Stamp on November 2nd and 3rd, 1988.

23. In that non-suit motion, Boise supported the dismissal of the I.A.M.’s request but again consistently took the position that the most appropriate result would be to have all instrumentation work performed by one bargaining unit, and in this case, the I.B.E.W.

24. In a decision of Vice-Chair Inge Stamp dated May 19th, 1989, the Board granted the non-suit motion.

25. Following receipt of the non-suit decision, Boise requested that hearing dates be scheduled with respect to its Complaint. In order to deal with this Complaint in a practical manner, Boise and the Respondents have agreed to set aside the initial two days of hearing to determine any preliminary jurisdictional issue which might be raised.

10. Boise filed copies of the I.A.M. and I.B.E.W. collective agreements. The union recognition and security clauses in these collective agreements contain the following provisions:

I.B.E.W.

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|-----|--|
| 301 | (a) The Union is recognized as the sole bargaining agent for all employees assigned to perform work such as that described in 301(b). |
| | (b) It is hereby agreed and understood that Local Union 1744, of the International Brotherhood of Electrical Workers, has jurisdiction over the work of installation, maintenance and repair and handling as presently practised of all electrical, electronic and Company-owned communications equipment including the electrical portion of metering, control instruments, computer systems and refrigeration units; including the installation, operation, maintenance generation and distribution of electrical power. The Company further recognizes the foregoing jurisdiction applies to work within the paper mill premises, power houses and other paper mill and craft mill operations associated directly with the Company’s paper mill operations. |
| 305 | The line of demarcation between Local 1744’s jurisdiction and the jurisdiction of the other mill unions shall be in accordance with the presently established jurisdictional lines. |

I.A.M.

- | | |
|-------|--|
| 301.1 | (a) The Union is recognized as the exclusive bargaining agent for all employees assigned to perform work such as that described in 301.1(b), 301.2 and 301.3. |
| | (b) It is hereby agreed and understood that Local 771 of The International Association of Machinists and Aerospace Workers has jurisdiction within the mill premises, power houses and any other property associated with the Company within the town limits of Fort Frances over the work of erecting, dismantling, |

assembling, repairing, maintaining and installing of all machinery and parts thereof and the operation of all machines in connection therewith, and all other work generally recognized as work of the work classifications in the bargaining unit, performed by the Company. It is agreed that this rule shall not be applied in such a manner as to prevent the assignment of employees in the Rigger Crew to perform the same work as has been generally recognized as the work of this crew in the past. Such employees, however, will not be assigned to work generally recognized as the work of millwrights and millwrights helpers to the extent of displacing, or excluding the re-employment of any employee now holding seniority as such.

- 301.2 Lodge No. 771 of the International Association of Machinists and Aerospace Workers is also recognized as the exclusive bargaining agent for all employees engaged in installation, maintenance, dismantling, repairing and assembling all pneumatic, hydraulic and fluidic instrumentation in the Fort Frances mill.
- 301.3 The union shall have jurisdiction over all operating and repairing positions in the Steam Plants, including Power and Recovery Boilers, Waste Back Fired Boilers, Turbines, Air Compressors portable and stationery, Refrigeration Units, Lime Kiln operation, Recaust operations and all related equipment to the aforementioned operations. Lodge 771 shall have jurisdiction over the maintenance and repairs as presently recognized under the maintenance classifications listed in Appendix A. The union shall have jurisdiction over sectionmen listed under Appendix A.

Each of these collective agreements contain the following provision:

- 303 Jurisdictional disputes shall be dealt with by the Unions involved in conformity with the regulations covering such matters as fixed by the A.F.L. - C.I.O. or The Ontario Labour Relations Act and shall be so resolved as to not adversely affect the efficiency of Company operations.

11. Paragraphs 18 of the *Synopsis* refers to certain letters dated September 22, 1987 sent to both trade unions by Boise. The letter to the I.B.E.W. Local President reads as follows:

Dear Mr. Langtry:

This will confirm our meeting of September 21, 1987. At that time I notified you that effective Tuesday, September 22, 1987 employees assigned to electronic instrumentation problems will, in the course of their duties, be assigned to address any pneumatic, hydraulic or fluidic problems they may encounter coincidental to their normal duties.

These employees will not call an Instrument Mechanic should they require help to resolve a pneumatic, hydraulic or fluidic problem. They will call their supervisor or the salary person on call.

Training will be made available as soon as possible and, in the meantime, the expertise of our supervisors will serve as on-the-job instruction.

Please make careful note of the fact that any refusal to carry out this work assignment will be met with disciplinary action.

Should you require further clarification, please feel free to contact me.

Respectfully,

J. Gartshore,
Electrical & Instrumentation Supt.

12. The I.B.E.W. Local President responded to Boise's position with the following letter dated September 28, 1987:

Dear Mr. Jim Gartshore:

At a meeting on September 21st, 1987 with Mr. J. Gartshore and Mr. L. Robinson, Local 1744 was informed that in the course of their normal duties in trouble shooting electronic circuitry concerned with computer systems, if the loop includes pneumatic components the members are expected to include the pneumatic work in the job assignment.

Mr. Jim Gartshore, you informed us that these instructions are direct orders and if refused the company would take appropriate action with that employee.

As President of Local 1744 I would state that pneumatics are not in our jurisdiction and as stated in our Brief submitted for 2747-84-JD. We as a group did not request that work or wanted it.

We are doing this under protest in every respect and are asking the company to cease to assign the members of Local 1744 as they have since September 22nd, 1987 at 8:00 A.M.

Respectfully

D. Langtry - President
I.B.E.W. - Local 1744

13. The I.A.M. Policy Grievance referred to initially in paragraph 19 of the *Synopsis* is worded as follows:

Employee's Statement of Grievance:

The Union grieves Company actions in assigning bargaining unit work to persons outside the bargaining unit contrary to the collective agreement.

Union seeks an order directing the company to cease such assignment and to pay damages to all those members of the Union who have lost wages and benefits as a result.

14. We propose to concisely set out the arguments made by counsel for the I.B.E.W. in support of the position that the Board does not have jurisdiction under section 91 to entertain this complaint. These arguments were supported by the representative of the I.A.M.:

- (1) Counsel argued as a general matter that section 91 of the Act should not be available to an employer to vacate its bargaining commitments. Counsel noted that his client was not taking the position that an employer could not be a complainant in a section 91 proceeding. Counsel referred to the language of section 91 and argued that the circumstances here do not fit within the language of the section. Counsel submitted that the language of section 91 should be interpreted so as to require that there be competing claims for certain work. Counsel noted that in the facts before us, there was no claim for the work by the I.B.E.W. The I.B.E.W. took the position that the I.A.M. work assigned to I.B.E.W. members was not work within the I.B.E.W. jurisdiction given the wording of the collective agreements. I.B.E.W. members performed the I.A.M. work assigned to them by Boise under protest and only when confronted with the threat of discipline. Given this position taken by the I.B.E.W., counsel argues that we do not have before us conflicting claims for the work and, therefore, no jurisdiction under section 91. Counsel argues that before the Board can assume jurisdiction under section 91(1), there must be a dispute between the three necessary parties.
- (2) It was argued on behalf of the I.A.M. that there has been no demand by

it for the work. Counsel for the I.B.E.W. also took this position. The focus of this argument was on whether the I.A.M. policy grievance can be interpreted as constituting a demand for the work. Counsel for the I.B.E.W. argued that the I.A.M. policy grievance cannot constitute a demand for the work since there is no specific request in the grievance that the work be assigned once again to the I.A.M. It was argued that the grievance amounts to no more than an allegation that Boise has contravened the collective agreement and a claim for damages. When the Vice-Chair asked counsel why the focus was only on the I.A.M. policy grievance given the wording of paragraph 19 of the *Synopsis*, counsel noted that he interpreted the facts set out in paragraph 19 as all relating to the I.A.M. policy grievance.

- (3) Counsel's final argument concerns the effect of Article 303 of the collective agreements in light of subsections (13) and (14) of section 91. Counsel submits that by Article 303 of the collective agreements, Boise has agreed that the trade unions shall deal with jurisdictional disputes. Although the trade unions were unable to resolve the complaint by the I.A.M., the dispute giving rise to Boise's complaint has been resolved as between the two trade unions. Given these circumstances, the Board has no jurisdiction to entertain the complaint under section 91(1) given 91(13) and (14).

15. The relevant provisions of section 91 provide as follows:

91.(1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers' organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.

(13) Where a trade union or a council of trade unions and an employer or an employers' organization have made an arrangement to resolve any differences between them arising from the assignment of work, the Board may, upon such terms and conditions as it may fix, postpone inquiring into a complaint under this section until the difference has been dealt with in accordance with such arrangement.

(14) The Board shall not inquire into a complaint made by a trade union, council of trade unions, employer or employers' organization that has entered into a collective agreement that contains a provision requiring the reference of any difference between them arising out of work assignment to a tribunal mutually selected by them with respect to any difference as to work assignment that can be resolved under the collective agreement, and the trade union, council of trade unions, employer or employers' organization shall do or abstain from doing anything required of it by the decision of the tribunal.

16. During the hearing on the merits, the Vice-Chair provided some brief oral reasons for the previous panel's ruling that the Board has jurisdiction under section 91 of the Act to entertain this application. The reasons for deciding that the Board has jurisdiction to decide Boise's application are as follows.

17. It is undoubtedly the case that a common feature of most jurisdictional disputes is conflicting claims by two trades over certain work. In this instance, the I.B.E.W. members did not want to perform the pneumatic instrumentation work and only performed this work under protest when threatened with discipline. Counsel argued that a request by the I.A.M. to have the pneumatic instrumentation work assigned to it, by itself, does not give rise to a jurisdictional dispute under section 91(1). In our view, the language of the provision clearly suggests otherwise. There is no indication in section 91(1) that the opinion of a trade or its members who are assigned the disputed work is of any significance. All that the provision requires is that there be a demand that the work assigned to one group of employees be assigned to other employees. In this case, a request by I.A.M. that Boise assign pneumatic instrumentation work only to its members is sufficient to give the Board jurisdiction. It is unlikely that the Legislature intended that a jurisdictional claim could be defeated in circumstances where the trade union whose members got the work assignment merely had to indicate that it did not want the work and performed it under protest. Few jurisdictional claims would ever be heard if the determining factor was whether or not the employees who were assigned the work performed it under protest.

18. The Board is satisfied that the I.A.M. demanded that the pneumatic instrumentation work assigned to the I.B.E.W. by Boise be assigned to its members. Paragraph 19 of the *Synopsis* indicates that this fact was agreed to by the parties. It provides that “the I.A.M. *verbally* and in writing demanded that the work be assigned to the I.A.M. and not to the I.B.E.W.”. [emphasis added] Even if our focus was only on the I.A.M. policy grievance, the Board is satisfied that the policy grievance represents a demand for the disputed work. The grievance complains that certain bargaining work is being assigned to persons outside the bargaining unit and requests an order directing Boise to cease the assignment and to compensate the I.A.M. members with their losses. If not explicitly, then certainly by implication, the I.A.M. requests in the grievance that the pneumatic instrumentation work be assigned only to its members. It is this request which gives the Board jurisdiction under section 91(1) to resolve this application.

19. The Board is unable to accept counsel’s interpretation of Article 303. Counsel argued that by agreeing to Article 303, Boise agreed to permit the responding parties to deal with jurisdictional disputes and that they have resolved the dispute giving rise to Boise’s application. In our view, Article 303 provides that jurisdictional disputes will be handled by the unions in a particular way. The provisions does not provide that only the trade unions will determine how jurisdictional disputes are resolved or that Boise is precluded from pursuing a jurisdictional dispute as it sees fit. As well, the Board notes that the dispute has only been resolved as between the two trade unions as a result of the settlement of the I.A.M. policy grievance which provided that the withdrawal of the assignment to the I.B.E.W. shall not interfere with the jurisdiction of the Board in this jurisdictional dispute proceeding.

THE MERITS

20. The Board’s jurisprudence discloses that the Board has regard to various relevant criteria in the exercise of its discretion under section 91 of the Act. What weight is given to each factor depends on the circumstances of each case. The Board notes that this is not a construction industry jurisdictional dispute but rather a dispute which arises in an industrial setting. Although still relevant, such factors as past practice may not as significant in the latter context. The Board finds the following criteria useful in assessing the circumstances of this complaint: employer preference, employer practice, area or industry practice, collective bargaining relationships, job security, skill and training and considerations of economy and efficiency.

21. The employer’s practice at Fort Frances is as described earlier. The instrument mechanics, members of the I.A.M., perform pneumatic instrumentation and the members of the I.B.E.W. perform electronic instrumentation. This practice is consistent with the provisions of the I.A.M. and I.B.E.W.

collective agreements. The employer's practice outside of Fort Frances is quite different. At Boise's mills in the United States, instrumentation work is performed by employees from one bargaining unit. At Boise's mill in Kenora, instrumentation work is also performed by members of one bargaining unit. The changes in technology and equipment also had an impact at the Kenora mill. Prior to 1980, instrument mechanics performing pneumatic instrumentation work were covered by the Operating Engineers' collective agreement. In 1980, the Operating Engineers agreed to transfer the instrument mechanics and the jurisdiction over pneumatic instrumentation to a local of the I.B.E.W. Boise provided the necessary training and no person performing instrumentation work was laid off or suffered any loss in pay. The employer's current practice in Kenora and at its mills in the United States is consistent with what was the situation at the Fort Frances mill in 1970 when the Board certified the I.A.M. for a tag-end unit. The state of the technology in 1970 meant that employees in one bargaining unit were responsible for instrumentation on the entire loop.

22. The practice in the industry is that instrumentation work is performed by members of one trade union. The Board was advised of only one exception to this practice - the Boise mill in Fort Frances.

23. Boise recognizes that both the instrument mechanics and the I.B.E.W. employees have valued skills and experience but is unable to adequately utilize these attributes. The existing demarcation line prevents existing employees from benefiting from modern training and experience. Instrumentation training provided by educational institutions covers both pneumatics and electronics. If Boise were to hire someone recently trained, that person would be unable to fully utilize their training at the Fort Frances mill. The Board agrees with Boise that the current demarcation line has a negative impact in the career development and future job security of employees performing instrumentation work.

24. Boise's evidence strongly suggests that the current demarcation line results in inefficiencies which leads to added costs and a negative impact on product quality. Although the responding parties claim that their members are able to work efficiently and cooperatively as a team, no evidence was called to support this position.

25. Although the number of persons involved in instrumentation work at the Fort Frances mill is relatively small, instrumentation work is a significant aspect of the operation of a modern pulp and paper mill. Given the competitive nature of the industry, there is a need to operate as efficiently as possible. Inefficient instrumentation has a severe negative impact on product quality which is an important factor to the long term viability of the mill. As noted earlier, the existing demarcation line requires Boise to often send 2 persons from 2 bargaining units to work on the same loop because it is difficult to determine at the outset whether the problem is pneumatic or electronic. This is obviously an inefficient way of operating. Since instrumentation involves complex problem solving, it is necessary for individuals to co-operate to resolve problems. Due to the impact of technology, the necessary amount of co-operation between the I.A.M. and the I.B.E.W. employees is not present. With the transfer of jurisdiction and some minimal training, Boise would be in the position to send 1 person from 1 bargaining unit to address any instrumentation problem. If more than one person was required, they could all work on the entire loop with the same knowledge and skills to rectify the problem. The inefficiency which the existing demarcation line creates makes it more difficult for the Fort Frances mill to compete with sister mills for capital dollars and with other industry players who are not burdened with the demarcation line. The Board notes that during the I.A.M. application, I.A.M. witnesses testified that it was not sensible or efficient to split the instrumentation work on a loop.

26. The existing demarcation line works to the disadvantage of the I.A.M. instrument mechanics since their job security is affected by the decrease in the number of pneumatic systems. The remedies which Boise seeks in this application contain various elements to protect the employment security of

all employees performing instrumentation work. The alternative remedy, in particular, would maximize the instrument mechanics employment security with minimal impact on the I.B.E.W.

27. There is little doubt in this case concerning the employer's preference. Boise has spent and plans to continue to spend a considerable amount of capital dollars to improve the technology and equipment at the Fort Frances mill. It prefers that this technology be used as efficiently as possible. Boise has also spent a considerable amount of time and resources to secure a resolution of this dispute in order that employees from one bargaining unit perform all instrumentation work. In Boise's view, the nature of the technological changes are such that all instrumentation work should be performed by the I.B.E.W.

28. In requesting the Board to exercise its discretion in favour of dismissing the application, the responding parties emphasized a number of factors. They argued that there is no conflict in the work jurisdiction set out in the relevant collective agreements and that the practice at Fort Frances has been consistent with the present demarcation line. Counsel argued that the Board should not accede to Boise's request to amend the bargaining unit descriptions given the impact this would have on existing bargaining rights and since the Board is being asked to do indirectly through section 91 of the Act what it does not have the jurisdiction to do otherwise. It was argued that Boise did not come to the Board with "clean hands" since it initiated a jurisdictional dispute by assigning pneumatic work to the I.B.E.W. in clear contravention of the I.A.M. collective agreement. Counsel also argued that the Board should permit the parties to resolve by themselves any difficulties Boise perceives it has with the way in which instrumentation work is being performed.

29. Although the Board has considered these factors, they do not warrant the weight which the responding parties have suggested. This is a work assignment dispute within an industrial setting. Section 91 provides the Board with a broad remedial power, including the power to amend bargaining unit descriptions in certificates or in collective agreements. It is contemplated that this remedy may have an impact on existing bargaining rights. Irrespective of how the jurisdictional dispute is initiated, the Board ultimately has a responsibility of determining the facts and whether the disputed work assignment was appropriate. In this case, Boise made the assignment to the I.B.E.W. with the strongly held belief that the existing demarcation line is irrational and results in considerable inefficiency. Its options for dealing with the situation were extremely limited. Although the practice at Fort Frances and the collective bargaining relationships are not insignificant, they are only two factors which must be assessed in light of all the other factors.

30. The Board is satisfied that Boise has exhausted all reasonable avenues to resolve this issue. The issue has come up during the course of collective bargaining. However, the Board recognizes that this type of issue is extremely difficult to address in multi-union central bargaining and would have a negative impact on collective bargaining. Since this is not an issue which can be bargained to impasse having regard to the relevant bargaining unit descriptions, it is extremely unlikely that the parties would be able to resolve this dispute in bargaining. The Board has had the benefit of observing the dispute over instrumentation work for many years. Boise has made realistic and good faith efforts to resolve the dispute. The numerous efforts the parties have made to resolve the issue have not succeeded. This is clearly a situation where the parties have exhausted all reasonable avenues to achieve a resolution of this dispute. In the Board's view, one of the purposes of section 91 of the Act is to permit the Board to intervene in circumstances such as these.

31. In examining the circumstances of this case, particularly the criteria of economy and efficiency, the Board is satisfied that Boise is entitled to an order confirming its assignment of pneumatic instrumentation to the members of the I.B.E.W. The existing demarcation line is irrational and its elimination will benefit Boise, the employees and the trade unions at the Fort Frances Mill.

32. As noted earlier, Boise has made two remedial requests. Its initial position was to have the Board direct that all pneumatic instrumentation be performed by members of the I.B.E.W. In its final argument, Boise favoured its alternative position which is to have the Board direct that all pneumatic instrumentation be shared on an interim basis. In other words, the instrument mechanics would perform pneumatic instrumentation and so would the members of the I.B.E.W. until there were no longer persons employed as instrument mechanics, in which case all instrumentation work would be performed by members of the I.B.E.W.. Boise has included with both remedial proposals a number of undertakings for the benefit of employees performing instrumentation work. The I.A.M. favoured the alternative remedy if the Board was inclined to allow the application.

33. The Board finds that the remedy which allows for shared jurisdiction over pneumatic instrumentation on an interim basis is the appropriate response. This response has the least negative impact on employees. Given the time that has elapsed, the Board finds it appropriate to remit this matter back to the parties to work out the details of this remedial response. Having been provided with the Board's decision on the merits of the application and the Board's determination that the shared jurisdiction remedy is the appropriate remedial response, the Board expects the parties will be able to resolve the remaining remedial details having regard to the present circumstances. If the parties are unable to resolve these remedial details within 30 days from receipt of this decision, the Board is prepared to entertain written submissions at that time and will decide any remaining remedial issue. The Board will remain seized of this application.

2717-95-R National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 636, Applicant v. **Canada Stampings & Dies Ltd.**, Stamptech Ltd., Responding Parties

Related Employer - Board finding businesses related or associated in view of findings that they have same general character, that they serve same market, that they employ same mode and means of production, that they have common management, and that the businesses are carried on for benefit of related principals - Alleged delay by union in making application and alleged failure to show erosion of existing bargaining rights not causing Board to exercise its discretion against making related employer declaration - Single employer declaration issuing - Request for additional relief, including order to recall certain laid-off employees, deferred to grievance arbitrator

BEFORE: *Christopher Albertyn*, Vice-Chair, and Board Members *R. W. Pirrie* and *C. McDonald*.

APPEARANCES: *Craig Grant*, *Arlen Renwick* and *Mark Arnett* for the applicant; *Robin B. Cumine* and *R. A. Hewitt* for Canada Stampings & Dies Ltd.; *Paul Brooks* and *Dave Hewitt* for Stamptech Ltd.

DECISION OF THE BOARD; June 10, 1996

1. This is an application for a declaration under subsection 1(4) of the *Labour Relations Act*, 1995 that the responding parties are one employer for the purposes of the Act. The relevant provisions of section 1 of the Act are as follows:

1. (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the

corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

• • •

(5) Where, in an application made pursuant to subsection (4), it is alleged that more than one corporation, individual, firm, syndicate or association or any combination thereof are or were under common control or direction, the respondents to the application shall adduce at the hearing all facts within their knowledge that are material to the allegation.

2. For the purposes of convenience, the parties are referred to as follows. The applicant may be referred to as “the union” or the “CAW”. The respondent, Canada Stampings & Dies Ltd., is referred to as the first respondent, as “Canada Stampings & Dies Ltd.”, as “CS&D” or as “the Dundas Street” company or operation. Stamptech Ltd. is referred to as the second respondent, as “Stamptech” or as “the Main Street” company or operation.

3. The respondents are located in Woodstock. CS&D has its business and manufacturing operation at 344 Dundas Street. Stamptech operates from premises at 124 Main Street.

4. The applicant also seeks orders that:

- Stamptech recognize it as the bargaining agent of Stamptech’s employees;
- employees of CS&D on lay-off be employed to fill positions at Stamptech;
- employees of CS&D on lay-off while junior employees performed bargaining unit work at Stamptech be compensated for lost earnings and benefits, plus interest.

5. The responding parties presented their evidence first. Two witnesses testified, Mr. Robert Arthur Hewitt, the effective owner of CS&D, and his son, Mr. David Ronald Hewitt, who is the general manager and principal shareholder of Stamptech. Thereafter, the union closed its case without calling evidence. What follows is drawn from the evidence of Mr. R.A. Hewitt (sometimes referred to just as “Mr. Hewitt”) and Mr. David Hewitt.

6. CS&D commenced business in 1898. In 1926 it moved to the Dundas Street premises in Woodstock where it is located at present. Also in 1926 it was incorporated, though under the name, Canada Casters Ltd.

7. In 1951 the union was certified by the Board in respect of CS&D’s employees. The certificate was not produced, but the Board’s decision which issued the certificate was. It reads as follows:

Decision: “The Board finds that all employees of the respondent, save and except foremen, persons above the rank of foreman and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

The Board is satisfied, on an examination of the records of the applicant and the records of the respondent, that more than fifty-five per centum of the employees in the bargaining unit are members of the applicant.

A certificate will issue.

8. The certificate is relevant to these proceedings because the collective agreement between the union and CS&D defines the union's bargaining rights by reference to the certificate. Article 1, Recognition, reads:

The Company recognizes the union as the bargaining agents for such employees as are named in the certification awarded by the Ontario Labour Relations Board, excluding such employees as are named in the said certification. Exception to be foremen, those above the rank of foremen, and office staff.

9. Despite the absence of any limitation upon the location of the union's bargaining rights in respect CS&D's employees, in practice (subject to what follows concerning Ingersoll) those rights were exercised in Woodstock, at the Dundas Street premises and at premises in Canterbury Street, of which there is more below.

10. Mr. Hewitt is the current beneficial owner, general manager and president of CS&D. He first became associated with the company in 1968 when he and a partner acquired ownership of it. The partnership ended in 1972 and Mr. Hewitt took over the Dundas Street company. Some time thereafter Mr. Hewitt changed the name of the company from Canada Casters Limited to its present name. Mr. Hewitt and his wife owned the shares in that company until November 1, 1993. As from that date the ownership of CS&D was acquired by R.A. Hewitt & Sons Limited. That company is wholly owned by Mr. Hewitt and his wife. The building and land on which the Dundas Street operation is situated is now also in the name of R.A. Hewitt & Sons Limited, which leases the site to CS&D. The alteration of corporate ownership was occasioned by estate planning advice given to Mr. Hewitt. Throughout these corporate adjustments, Mr. Hewitt remained in overall control and charge of the Dundas Street operation.

11. CS&D has had a continuing collective bargaining relationship with the union. During the long period of Mr. Hewitt's tenure of the company he negotiated each collective agreement on behalf of CS&D until the most recent collective agreement, concluded in March 1994. That agreement was negotiated by CS&D's then general manager, who has since left the company.

12. Mr. Hewitt claims that, despite the "all employee" bargaining unit description in the original certificate issued to the union in 1951 and the terms of the recognition article of the collective agreement, since he has been associated with CS&D the bargaining unit has applied only to full-time employees. He contends that part-time employees who perform work referred to in the collective agreement have been excluded from the bargaining unit. The union appeared to challenge that claim, though it presented no contrary evidence at the hearing.

13. CS&D is primarily a custom metal stamping business. It also does most of its own die work. The company produces components for equipment manufacturers to use in their products, e.g. the company makes stampings for automobile, appliance, gas valve and bus manufacturing businesses. The company also has a product line of its own. It produces baby crib hardware, which the company markets itself. It also does other small stampings which it markets itself: orchard box brackets and exhaust tab locators. The company's own product line constitutes about 10% of its total output.

14. CS&D employs between 5 and 9 employees, depending upon demand and the rate of production, who are within the union's bargaining unit.

15. CS&D has certain zoning limitations upon its Dundas Street operation. It cannot use machines greater than a certain maximum size. The largest press used in the Dundas Street operation is a 110 ton press.

16. There has been little change in CS&D's business over the past decade, other than that it now has greater demand for larger stampings than it can perform at the Dundas Street plant. The company must sub-contract the larger stampings. Stamptech is the principal, if not the only, beneficiary of such sub-contracting. In large measure Stamptech does CS&D's larger stampings which cannot be done at the Dundas Street factory.

17. We shall return to Stamptech when we describe its origins. Suffice at this point to say that it takes on CS&D's heavier work which cannot be performed at the Dundas Street factory.

18. Prior to 1990, CS&D operated from one other outlet in Woodstock. For about 8 or 9 years before 1990 CS&D had a repair facility at Canterbury Street in Woodstock. There it refurbished and repaired punching presses. CS&D's surplus punching presses were sent there for repair and refurbishment, with a view to their re-use or sale. Baby crib frames were also manufactured at Canterbury Street, although that operation later returned to Dundas Street before being moved to Ingersoll, of which there is more below.

19. The collective agreement between CS&D and the union covered the Canterbury Street facility and the 3 to 5 employees there. The union asserted bargaining rights over all of CS&D's outlets in Woodstock.

20. In 1990 Mr. Hewitt initiated a new venture through a company associated with CS&D, which he named Canada Stampings Presses & Equipment Limited. The venture was intended to purchase defective punch presses, refurbish them and sell them, and to repair punch presses and to combine those activities with CS&D's Canterbury Street operation. The new venture was not primarily a manufacturing operation, but rather more a repair and maintenance business. There was, however, some subsidiary manufacturing included in the project. Some of the operation of CS&D at Dundas Street - crib spring manufacturing, under-crib frame bending and perforating, and crib spring assembly - was to be included in the new venture.

21. The profit margins in the new venture were anticipated to be small, and Mr. Hewitt sought some accommodation from the CAW to introduce certain new classifications at a lower hourly rate than was provided in the collective agreement (for crib spring manufacturing, under-crib frame bending and perforating, and for crib spring assembly). The CAW was not willing to make that accommodation, so Mr. Hewitt decided to establish the new business in Ingersoll where suitable premises could be obtained, rather than in Woodstock. Mr. Hewitt took an initial lease of 3 years over the Ingersoll premises. So the Canterbury Street operation of CS&D in Woodstock was closed in 1990.

22. The new venture was to carry on business in Ingersoll. Baby crib frame manufacture was moved there. That manufacture was originally at Canterbury Street, but some time prior to the establishment of the Ingersoll plant, it had been moved to the Dundas Street operation. Crib spraying too was done in Dundas Street, and that too was moved to Ingersoll. The refurbishment of presses had been done at Canterbury Street. That too was moved to Ingersoll.

23. Hence, to summarize, all of CS&D's Canterbury Street operation moved to the new Ingersoll plant, and so did some of the company's Dundas Street operation.

24. CS&D and the CAW provided for the possible extension of their collective agreement to Ingersoll. The collective agreement between them for the period October 20, 1990 to October 19, 1993 and the subsequent agreement from 1993 to 1996 have a memorandum of agreement as their last page. The wording of the last page is the same in both agreements. It reads as follows:

MEMORANDUM OF AGREEMENT

between

CANADA STAMPING PRESSES AND EQUIPMENT

and

CAW-CANADA

The Company recognizes the Union (CAW-Canada) as the bargaining agent for the former Canada Stampings and Dies Limited employees (Woodstock) who are now employed in the bargaining unit at Ingersoll.

The Company and the Union agree that the collective agreement applicable to the employees in this bargaining unit will be the Canada Stampings and Dies Limited agreement.

It is recognized by both parties that the Ingersoll Unit of Canada Stamping Presses and Equipment employees will have to ratify the terms and conditions of this agreement by a vote separate from the Woodstock Canada Stampings and Dies Limited employees.

25. Neither party took any action under the agreement in relation to the Ingersoll workers. No vote was held among the former CS&D workers to ratify the agreement and make it applicable to them and, as a result, it was not made applicable.

26. Given the lull in the economy at the time, the Ingersoll endeavour was not a thriving success. When the lease on the Ingersoll premises was due to expire in November 1993, Mr. Hewitt decided to close down that operation. When Canada Stampings & Presses Equipment Limited was wound up, CS&D assumed all of its assets and liabilities. There was a lot of machinery and equipment at Ingersoll, which Mr. Hewitt decided to move back to Woodstock. He acquired premises at Main Street from February 1, 1994 and the heavy presses and the equipment needed for crib frame manufacture were moved there. (Although the Ingersoll lease expired in November 1993, the new tenant of those premises allowed Mr. Hewitt to store the machinery and equipment there until the Main Street lease commenced). Those assets were to form the basis of what, a year later, was to become Stamptech Ltd. when it was incorporated in February 1995.

27. Mr. Hewitt put the Main Street lease in the name of R.A. Hewitt & Sons Ltd. That has not changed. The lease has expired and now continues from month to month, but no other lessee has been substituted. The Main Street operation was part of CS&D, which sub-leased the premises from R.A. Hewitt & Sons Ltd., just as Stamptech now does. Stamptech assumed responsibility for the payment of the rent in about the fall of 1995.

28. Mr. Hewitt took the Main Street premises primarily to store the heavy presses and the other machinery and equipment which had been at Ingersoll, and to continue the manufacture of the baby crib frames, and the spraying of cribs sold by CS&D. Some repair and refurbishment of presses was to be, and was, done at the Main Street operation. The business being conducted at Main Street was under the control and direction of Mr. Hewitt, and it was an extension of CS&D's business.

29. A bending operation had been performed at Dundas Street. The task involves bending tubing into a rectangular shape and punching holes into it. There is some confusion as to whether this operation went via Ingersoll to Main Street or directly there - Stamptech's response to the application suggests that it moved from Dundas Street to Main Street in February 1994; Mr. Hewitt's evidence at the hearing suggests that it went there via Ingersoll - but what is clear is that, one way or another, it moved from Dundas Street to Main Street. The bender and perforator for that operation was moved from Dundas

Street to Ingersoll, and from there to Main Street. It involves between 4 to 8 hours of work a week at Main Street.

30. The machinery moved from Ingersoll to the Main Street operation included big tonnage stamping presses and dies. Those machines could not be moved to the Dundas Street operation because the zoning restrictions in force there prevent the use of such heavy equipment. CS&D could not expand its operation into heavy press usage at Dundas Street because of the restrictions, but the Main Street operation was suitable for such expansion. Heavy metal stamping at the Main Street operation amounts to about 20 hours work per week. This work is the same as that done by CS&D at Dundas Street, except that the stamping tonnage and the dies at Main Street are larger.

31. Leaving aside the work that went from Dundas Street via Canterbury Street to Ingersoll and then to Main Street, and the work that went from Dundas Street to Ingersoll and then to Main Street, and the bending - perforating operation which went from Dundas Street either directly to Main Street or via Ingersoll, there has been some direct, though tiny (about 2 hours a month), loss of work at Dundas Street as a result of the opening of the Main Street operation. The stamping of a metal flange was moved to Main Street when a modification to the die required a press with heavier tonnage than could be accommodated at Dundas Street. The press is now located in the Main Street factory.

32. Mr. David Hewitt claimed that there has also been some enhancement of work at Dundas Street as a result of the establishment of the Main Street operation. He referred to the production of cross slats. That work was previously done in Ingersoll, and it was moved to Dundas Street from there. It was never at Main Street. It amounts to about 2 to 3 hours of work a week.

33. When the Main Street operation commenced, after the closure of the Ingersoll plant, Mr. Hewitt played a very active role in nurturing the new endeavour. He ran the operation for its first 15 to 18 months (from February 1994 until about mid-year 1995), as he did, and does, the Dundas Street factory. For a variety of economic reasons, not explored in evidence, Mr. Hewitt decided early in 1995 to separate the corporate structure of the Main Street business from his Dundas Street business. He set up Stamptech Ltd. in February 1995, although Stamptech did not do business under its own name until the summer of 1995. Mr. Hewitt was a founding director. Since then he has sought to transfer control of the company from himself to his second son, David Hewitt. Mr. David Hewitt was to assume control and responsibility for the business. Once Stamptech Ltd. was established Mr. Hewitt increasingly shed his control and influence over the Main Street operation and its direction passed from him to his son, David. By September 1995, Mr. Hewitt had effectively ceased to have any supervision or control of the operation at Main Street, which has now passed to Mr. David Hewitt, save that Mr. Hewitt remains the Secretary-Treasurer of Stamptech. He could not recall if he is still a director of Stamptech and he thought he owned only 1 share of 10,300 shares. (That was the number of shares mentioned by Mr. Hewitt in evidence; the responses of both responding parties gives a figure of 10,004 shares. Nothing turns on this difference, or on the difference between these figures and that given by Mr. David Hewitt in evidence). Mr. Hewitt now has no day-to-day involvement in the business. His son, David, testified that there were 15,000 shares, of which he owns about two thirds, and his younger brother, John, owns about one third. How the two young men were able to raise the capital necessary to acquire the shares was not explored in evidence, and we assume, in the absence of evidence to the contrary, that they were not assisted by Mr. Hewitt, R.A. Hewitt & Sons Ltd. or CS&D in making that acquisition. Only 2 shares are not held by them: one is owned by Mr. Hewitt and one by his eldest son (David's and John's eldest brother).

34. Mr. David Hewitt testified that, in his view, Stamptech did not become a completely separate business operation from CS&D until September 1995. Until then, though to a declining extent, it was ostensibly and practically a division of CS&D. Since September 1995, and to an increasing extent in

the immediately preceding period, David Hewitt directs and manages Stamptech, even although his involvement occupies only about half of his working time. He makes the company decisions on behalf of Stamptech, consulting his younger brother and co-shareholder, John, when he considers that necessary. David Hewitt decides what work is to be done by Stamptech, and how it is to be done.

35. To situate this application (dated October 13, 1995) in the chronology of the establishment and development of Stamptech, the union filed its grievance with CS&D, which gave rise to this application, on March 28, 1995, i.e. approximately a year after the Main Street operation began and approximately a month after Stamptech was established, although it was not to trade under its own name for many months to come. The group grievance includes the following,

The union protests on its behalf and on behalf of the affected group of workers, the actions of the company in failing to apply the collective agreement at its facility on (124 Main St. Woodstock, Ontario).

The company has therefore violated article 1 and other related sections of the collective agreement including wages, seniority, layoff and union dues.

We therefore request that the collective agreement be applied to this facility (124 Main St. Woodstock, Ont.) and that all damages payable to the affected workers and the union be paid by the company with interest.

36. The grievance was not resolved by the parties and it was referred to arbitration under what is now section 49 of the *Labour Relations Act*. The arbitration was scheduled for hearing on September 29, 1995. At the hearing, CS&D challenged the jurisdiction of the arbitrator, arguing that the Board should determine first whether Stamptech was related or associated with CS&D. The arbitration did not proceed and the union then brought these proceedings.

37. Stamptech now has its own lawyer, bank account, pay roll, minute books and auditor, distinct from those of CS&D. This separation has obtained at least since October 1995. Stamptech submits a separate tax return from CS&D. It has no loans from CS&D, and nor has CS&D provided any security or guarantee on behalf of Stamptech. Stamptech does not share logos or letterheads with CS&D. Stamptech has only one employee who works part time as a punch-press operator. He worked at Dundas Street for about 2 weeks, about 2 years ago. Other than that, there has been no inter-mingling of employees between the two companies.

38. Despite the factors suggesting separation and independence of Stamptech from CS&D, the Bell telephone directory for Brant, Oxford, Regional Municipality of Haldimand-Norfolk, including among other towns Woodstock, for the period 1995-1996 has the following entries:

Canada Stampings & Dies Ltd.	344 Dundas	... 537-6245
Plant 2	124 Main	... 537-0102

Thus, Stamptech is referred to as "Plant 2" under CS&D. Mr. David Hewitt explains this apparent anomaly as originating from the time when the Main Street telephone was first installed in the Main Street factory. At that time Bell put the telephone number under CS&D and, despite requests to have the Main Street operation line appear beside a Stamptech entry in the directory, Bell has not yet made the alteration.

39. Certain suppliers and customers have confused CS&D and Stamptech by referring to Stamptech as CS&D in their invoices. Mr. David Hewitt has endeavoured to correct such errors by advising of the separation between the two entities.

40. All of the work performed by Stamptech is done under contract for CS&D. Stamptech has no work other than the work it receives from CS&D. When Mr. David Hewitt was asked whether any endeavour had been made to secure other customers besides CS&D, he replied that no such endeavour had been made, pending the outcome of these proceedings and the dispute with the union as to whether the collective agreement between CS&D and the CAW is binding upon Stamptech and the Main Street operation. In a sense, any expansion of Stamptech's business is being delayed pending the resolution of this application.

41. The materials used by Stamptech to produce goods for CS&D are owned and supplied by CS&D. Some of the machinery used by Stamptech is its property, e.g. the decoiler; other equipment, e.g. the coil feeder, is the property of R.A. Hewitt & Sons Ltd., on lease to Stamptech. The end product produced by Stamptech is the property of CS&D. Stamptech gets paid only for the value it adds to the raw material supplied by CS&D.

42. CS&D passes all of its heavy press work to Stamptech, unless the task is too large even for Stamptech's large presses.

43. David Hewitt works part-time at Stamptech. He also claims to work full-time for CS&D, working as a member of its management. He therefore works in Dundas Street and at the Main Street factory. Although his working time is divided roughly equally between his responsibilities as a member of the management team in Dundas Street and his duties as the managing director of Stamptech, his earnings are not in the same proportion. He earns about 75% of his income from CS&D and about 25% from Stamptech. His Stamptech income is effectively subsidized by CS&D. He sees this as a transitional phenomenon, expecting that as Stamptech's business grows it will be able to provide its fair contribution to his income.

44. In order to determine "relatedness" or "association" as between CS&D and Stamptech, we have regard to some of the standards established in previous Board decisions. In *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, at 949, paragraph 15, the following indications of relatedness or association are suggested:

It is not necessary to have shared participation in a common business endeavour or even contemporaneous economic activity. The relationship between the business entities is a functional rather than a temporal one. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills, and are carried on for the benefit of related principals. If these criteria are met, two businesses may be "related" within the meaning of section 1(4) even though their activities are carried on through different corporate vehicles and are not carried on simultaneously. It is evident that the Legislature has created a regime of collective bargaining law which significantly modifies the common law notions of "privity of contract" or "the corporate veil".

45. There are some features of distinction between CS&D and Stamptech, referred to above. But, overwhelmingly, the two businesses are related or associated. CS&D and Stamptech have the same general character; they serve the same general market (Stamptech reaching that market purely through the vehicle of CS&D); they employ the same mode and means of production; they utilize similar employee skills, if not (other than in management) the same employees; the businesses have common management, in the persons of Mr. David Hewitt (a member of CS&D's management team and the managing director of Stamptech) and Mr. Hewitt (the managing director of CS&D and the Secretary-Treasurer of Stamptech); the companies are publicly perceived, albeit erroneously, as being one and the same; and the businesses are carried on for the benefit of related principals. At the time of this application and in the preceding period the two sites, Dundas Street and Main Street, were ultimately under the common control and direction of Mr. Hewitt. Furthermore, besides the direct transfers of work from Dundas Street to Main Street, and the transfers from Canterbury Street and Dundas Street

via Ingersoll to Main Street, Main Street's operation is substantially concerned to perform work for CS&D which CS&D cannot do at Dundas Street because of the by-laws that restrict the size of the stamping machines which can be located there. The Main Street operation exists principally because part of CS&D's manufacturing cannot be performed from its own premises. Mr. Hewitt started the Main Street operation to continue work he had previously had done in Dundas Street, Canterbury Street and Ingersoll. The work done in Main Street is directly related to the needs of CS&D. R.A. Hewitt & Sons Ltd. holds the leases of both premises, and sub-lets to CS&D and Stamptech respectively. Thus control of the premises vests in what is essentially Mr. Hewitt's holding company. CS&D subsidizes Mr. David Hewitt's income from Stamptech by paying a disproportionate share. Stamptech has no work other than that which it receives from CS&D, and it has not to date sought to obtain other work. The raw materials used by Stamptech, some of its machinery and equipment, and its final products are owed by CS&D or by R.A. Hewitt & Sons Ltd. Stamptech functions effectively as a department of CS&D, although located separately. It is true that since about September 1995 Mr. Hewitt has substantially ceased to manage Stamptech, and that that task has now been assumed by David Hewitt, with some assistance from his younger brother, John, but Mr. Hewitt, who controls CS&D, remains the Secretary-Treasurer of Stamptech.

46. The above conclusion of association or relatedness as between CS&D and Stamptech is drawn from the evidence presented at the hearing. That evidence was partly chronological, but substantially descriptive of the present circumstances as between CS&D and Stamptech, i.e. as they appear in late April 1996. The evidence showed that there has been a conscious endeavour by Mr. Hewitt to extricate himself from the Main Street operation and to transfer control to David Hewitt. That process commenced in earnest only once Stamptech was formed in February 1995. The union's grievance on this matter was filed in March 1995. At that time Stamptech had been registered, but it was not to make its public appearance until about October 1995. At the date of application, October 13, 1995, Stamptech had barely shown its existence. The Main Street operation was only then emerging as even apparently distinct from CS&D. Up to that date, the two operations appeared to be one and the same. Hence, we have found that CS&D and Stamptech, while appearing to be two distinct businesses, are essentially the same business. In October 1995 they did not even appear to be distinct businesses.

47. While opposing the conclusion we have reached that the responding parties are related or associated businesses, counsel for Stamptech directed much of his argument to contending that, were we to make a finding of relatedness or association, we should nonetheless exercise our discretion not to make a declaration under subsection 1(4) of the Act. Counsel emphasized that the conclusion of association between two businesses does not necessarily lead the Board to make a declaration under subsection 1(4) of the Act. That declaration, on counsel's submission, should be made only if there has been an erosion of CS&D's bargaining unit work. Counsel suggested that, although there was some minor transfer of work from CS&D to Stamptech, when evaluated overall, CS&D has had a net gain in bargaining unit work time as a result of the establishment of Stamptech.

48. We accept Stamptech's counsel's submission that there are two separate inquiries in applications of this sort: one to determine if the two businesses are related or associated, as we have found that they are here; the other to decide whether or not the declaration should be issued.

49. The scope of subsection 1(4) of the Act is well described in *KNK Limited*, [1991] OLRB Rep. Feb. 209, at 215:

29. Section 1(4) of the Act was enacted in 1971. It deals with situations where the commercial activities which generate employment relationships regulated by the Act, may be carried on through more than one legal entity. Where those legal entities are engaged in related economic activities under common control or direction, the Board is empowered to "pierce the corporate veil" and declare them to be one employer for the purposes of the Act.

30. Section 1(4) clearly and specifically modifies both the common-law notion of “privity of contract” and commercial law assumptions based upon the separate legal identity of the corporate shell. As a result of section 1(4), collective agreement rights need not be co-extensive with the legal framework of the business. To this extent, labour law insulates collective bargaining from disruption should the exigencies of the market prompt an employer to change the number or form of the legal vehicles through which it carries on business. As a result of a 1975 amendment, section 1(4) no longer requires that related business activities be carried on simultaneously. The Legislature has recognized that the identity of the business (as opposed to its legal envelope) may be preserved even though the legal vehicles through which it is carried out may change from time to time.

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33. It is important to note that section 1(4) is not an unfair labour practice provision. Although some commercial dealings which trigger section 1(4) may constitute an unfair labour practice, section 1(4) itself does not require a finding of “anti-union animus”. It is not limited to commercial “schemes” designed to escape from the union. It can also apply to *bona fide* business transactions which only incidentally frustrate established statutory rights. Section 1(4) is not a “penalty” provision. It merely allows the Board to consider such business transactions from a labour relations perspective rather than common or commercial law rules.

50. Stamptech’s counsel referred to several Board decisions, including *Bramalea Carpentry Associates*, [1981] OLRB Rep. July 844, at 847-849; *George Hamers Limited*, [1981] OLRB Rep. Oct. 1382 at 1385; *City of Toronto Non-Profit Housing Corporation*, [1982] OLRB Rep. Feb. 280, at 282, paragraph 4; *Gerald Davidson Plumbing & Heating Limited*, [1984] OLRB Rep. Mar. 462, at 465-6, in support of his argument that the Board should not exercise its discretion under subsection 1(4) in this case. He and counsel for CS&D argued that subsection 1(4) can be used as to preserve bargain rights - to prevent their erosion, but not to extend bargaining rights, as, they suggested, is the case here. To use a metaphor, counsel contended that subsection 1(4) can be used as a shield, but not as a sword.

51. Stamptech’s counsel argued too that the union had delayed unnecessarily in bringing this application, and for that reason alone we should not issue the declaration sought. Counsel suggested that the union had waived its claim to the bulk of the Main Street operation’s work because that work had come from the Ingersoll factory, over which, he contended, the union had not bothered to exert its bargaining rights. Then, once the Main Street operation commenced in February 1994, despite the openness and lack of concealment of that operation by management, the union took no action until the filing of its grievance more than a year later, in March 1995. In the circumstances of a delay of that duration, counsel submitted, the Board should not be disposed to grant a declaration under subsection 1(4) of the Act. Counsel referred to the decision in *Andreynolds Company Limited*, [1990] OLRB Rep. Nov. 1107 at 1113 as authority for the submission.

52. The difficulty faced by a union in applications of this sort where an employer expands its business to new premises, if we were to follow the erosion test recommended by CS&D’s and Stamptech’s counsel, is that if the union makes the application before there has been actual erosion of bargaining rights, then it is told that its application is premature, but if it makes the application only once there is evidence of erosion, it is told that it has abandoned its bargaining rights by moving the application too slowly.

53. The union did not abandon its bargaining rights. The union expressly asserted bargaining rights in the collective agreement concluded in 1990 in respect of the Ingersoll operation just as it was commencing, even although the union did not then act upon the rights it had protected. When the subsequent collective agreement was concluded, for the period 1993-1996, the union again asserted collective bargaining rights over the Ingersoll plant, though again without following up on them. By ensuring reference to the collective bargaining rights over certain workers at the Ingersoll plant the union was expressly not waiving any right it had to bargain on their behalf.

54. As regards the allegation that the union delayed bringing this application, there was no evidence to suggest that the union was aware of the establishment of the Main Street operation before March 1995. But even if the union were aware of that development from its inception a year earlier, it could not have brought this application until it had knowledge of the separate legal *persona* of Stamptech. Stamptech was incorporated in February 1995 but its existence was not then apparent. Its existence became apparent only in the fall of 1995 and the union diligently brought this application soon thereafter.

55. To the extent that there was any delay in the union's bringing of this application, no evidence of any prejudice on account of the delay was presented at the hearing.

56. The responding parties have argued that the union must show an erosion of their existing bargaining rights, and that they cannot claim bargaining rights in respect of the extension or growth of a business. We have found that there has been an erosion of their extant bargaining rights. Nonetheless, the distinction between erosion and extension of bargaining rights, like the analogy of a shield and a sword, is not entirely sustainable. There are circumstances in which bargaining rights are adversely affected, though not necessarily eroded, by the expansion of a business to a new location. The concept of "erosion" does not adequately address the situation in which the growth that would otherwise fall within the description of the original bargaining unit, passes elsewhere solely on account of the establishment of that separate corporate entity. Erosion of bargaining rights is just one manifestation of the principle upon which the Board finds its discretion in these applications. The preservation of bargaining rights is concerned not only with maintaining the status quo relationship between the union and the employer, but also with ensuring that the growth of the business accrues to that bargaining unit, and not outside of it provided, of course, that the growth falls within the parties' bargaining unit description. This notion was described in *The Great Atlantic & Pacific Company of Canada Limited*, [1981] OLRB Rep. Mar. 285, at 289 paragraph 15: "The very purpose of section 1(4) is to ensure that the union's bargaining rights and the scope of the collective agreement will not be restricted simply because an employer chooses to expand through a new corporate vehicle rather than its existing one".

57. The discretion as to whether to issue a subsection 1(4) declaration is exercised by the Board in various circumstances. It is not generally exercised in an "upstream" application, that is where the union has acquired bargaining rights in a subsidiary or subordinate operation and then seeks to flow "upstream" to secure bargaining rights under subsection 1(4) in the principal operation. That was the case, for example, in *Bramalea Carpentry Associates*, relied on by Stamptech's counsel and referred to above. In other words, where the union seeks a subsection 1(4) order as a substitute for certification in circumstances in which, but for the existence of two separate legal *personae*, it would not have had bargaining rights, the Board will decline to exercise its discretion. We understand the decision in *B & M Millwork Ltd.*, [1991] OLRB Rep. Apr. 438, relied upon by Stamptech's counsel, to have been made in that context. The circumstances in which the Board will exercise its discretion under subsection 1(4) are those in which the union would have exercised bargaining rights, but for the intrusion of a different corporate entity. In other words, if a union's existing bargaining rights are adversely affected, or if those rights are potentially adversely affected, by the operation of a related or associated business then the Board should exercise its discretion to make a declaration under subsection 1(4).

58. There has been a direct loss of work, or erosion of bargaining rights from Dundas Street to Main Street, in that the stamping of a metal flange was moved from the former to the latter. Also a tube bending and hole punching process was moved from Dundas Street (perhaps via Ingersoll) to Main Street. That too was work performed by bargaining unit employees. The transfer of that work would entail a diminution of the union's bargaining rights if our discretion under subsection 1(4) of the Act were not exercised in the applicant's favour.

59. There was also an indirect loss of work to bargaining unit employees in that work formerly done by bargaining unit employees at Canterbury Street went via Ingersoll to Main Street. But for the establishment of the separate legal entity of Stamptech that work would have been performed by CS&D and covered by the CS&D collective agreement with the union. If we were not to exercise our discretion in the union's favour, the union's bargaining rights in that respect would be diminished.

60. In our view, the proper test, as applied in *KNK Limited*, above, and *Great Atlantic and Pacific*, above, is to determine whether the existing bargaining rights of a union, as defined by the bargaining unit description, are adversely affected, or potentially adversely affected, by the establishment of the new operation. This principle was referred to as follows in *Great Atlantic and Pacific Company of Canada Limited*, above 285, at 289:

15. ... But for the creation of a separate vehicle, the work opportunities associated with the related business activity, and the conditions of employment of the employees engaged in that activity, would be regulated by the collective agreement. The very purpose of section 1(4) is to ensure that the union's bargaining rights and the scope of the collective agreement will not be restricted simply because an employer chooses to expand through a new corporate vehicle rather than its existing one.

61. In the facts of this case, there has been a directly adverse affect upon the CS&D bargaining unit by the establishment of a manufacturing operation in Main Street in that work that was originally done at Dundas Street is now done at the Main Street plant (whether via Canterbury Street and/or Ingersoll or transferred directly). There was in fact a diminution of the existing bargaining rights of the union occasioned by the passing of business to the Main Street operation. There is also a potentially adverse effect on the union's bargaining rights in CS&D by the establishment of Stamptech in that the natural growth of CS&D's enterprise at Dundas Street has been transferred to Stamptech at Main Street. Dundas Street's expansion is limited by zoning restrictions and considerations of size. CS&D's business expansion into larger pressing is happening at the Main Street plant. As Mr. David Hewitt suggested in testimony, there is room for expansion of Stamptech's business, but that expansion has been delayed pending the outcome of this application. If the zoning restrictions in Dundas Street were not as they are, in all likelihood the expansion of CS&D's business would have occurred there, and not in Main Street. In those circumstances there would have been no doubt that the union's bargaining rights extended to cover that expansion. The difference of location does not change that result. As stated in *KNK Limited*, above, at page 219, paragraph 45: "... section 1(4) prevents the extinction of bargaining rights from unilateral employer action and/or commercial law considerations unrelated to labour relations". The bargaining rights of the union in this case would be potentially adversely affected if a subsection 1(4) declaration were not made.

62. In light of all of the above considerations, we are disposed to make the subsection 1(4) declaration sought by the union in respect of the responding parties.

63. We now address the question of the date from which the subsection 1(4) declaration should be effective. The Board's usual course is to make the declaration with retrospective effect to the date upon which the separate entity was established. The Board will depart from that approach if the appropriate balance of labour relations interests requires it (*Jarrett Construction Limited*, [1992] OLRB Rep. May 586). The union acted with reasonable diligence to assert its claim to include Stamptech within the bargaining unit upon learning of its existence. It did so first by filing a grievance on March 28, 1995, approximately a month after the incorporation of Stamptech. In our view, the declaration of CS&D and Stamptech as constituting one employer for the purposes of the Act should be made retrospective to the date of the union's grievance on March 28, 1995, from when the employer became aware that the issue in this case was alive.

64. The union has asked for certain additional relief besides a subsection 1(4) declaration. In particular, it seeks orders that employees of CS&D on lay-off be employed to fill positions at the Main Street operation and compensation for CS&D employees on lay-off who have greater seniority than employees at Stamptech. As a purely collateral matter there was some evidence and suggestion, notwithstanding the express terms of the bargaining unit description in the recognition article of the parties' collective agreement, that the parties' collective agreement is restricted to full-time employees. We express no opinion on this matter, nor have we made any finding in that regard. Should any of the parties need to pursue this issue, like the ancillary relief sought by the union, those are matters which, in our view, should better be determined by arbitration under the collective agreement, and not by the Board. The question of the rights of employees of CS&D on lay-off to work at Stamptech is also a matter for decision by an arbitrator.

65. Accordingly, we declare that Canada Stampings & Dies Ltd. and Stamptech Ltd. are one employer for the purposes of the Act, with effect from March 28, 1995.

66. We retain jurisdiction to address any dispute arising from this decision.

0397-96-R Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., Applicant v. **Citipark Inc.**, Responding Party

Certification - Intimidation and Coercion - Representation Vote - Union winning representation vote but employer seeking dismissal of certification application under section 11(2) of the Act - Employer alleging that union official accosted voters outside as they approached building to cast ballots in representation vote - Employer submitting that such conduct depriving employees of ability to freely express true wishes - Board rejecting employer's submission - Certificate issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *S. C. Laing* and *R. Montague*.

APPEARANCES: *James Hayes, Linda Micks, Allen Ferens* and *James Webber* for the applicant; *David Cowling, Caroline East, Glenn Hannah* and *Peter Osborn* for the responding party.

DECISION OF THE BOARD; June 18, 1996

1. This is an application for certification.
2. By decision dated May 8, 1996, the Board (differently constituted) directed that a representation vote be taken in the application.
3. In accordance with the Board's decision or during the vote, the responding employer filed a statement of representations and asserted that the Board should dismiss this application pursuant to section 11(2) of the *Labour Relations Act, 1995*, as follows:

STATEMENT OF REPRESENTATIONS

1. A vote was held in the above-noted matter on Saturday, May 18, 1996 between the hours of 7:00 a.m. to 8:30 a.m. and between the hours of 3:00 p.m. to 5:00 p.m.. The vote was conducted in a room off the lobby on the main floor of the office building which contains the Ontario Labour Relations Board.
2. Linda Micks ("Micks") who is an officer, official or agent of the Applicant trade Union

attended at the vote. Micks did not, however, act as a scrutineer at the vote. Rather, Micks stood outside of 400 University Avenue and accosted individuals as they came to attend at the vote.

3. There were three people who voted in the morning session of the vote. In the afternoon session, 16 people attended to vote. Again, in the afternoon, these people were accosted by Micks outside of 400 University Avenue. Each person was stopped and Micks spoke with them on average of 10 minutes each.
4. Caroline Sothern ("Sothern") complained to the Labour Relations Officer, Sonny Udasco about the conduct of Micks. The Officer indicated to Sothern that he did not view the conduct as appropriate, however, he could do nothing about it as it was outside the premises. The Officer further indicated that the Employer would have an opportunity to make representations about the conduct of the Applicant surrounding the vote and advised Sothern to do so.
5. Micks returned into the polling area and attended at the counting of the ballots at approximately 5:05 p.m.. Of the 19 ballots that were cast, 18 ballots were cast in favour of the Applicant and one ballot was spoiled.
6. It is the submission of the Responding Party that the Applicant's conduct constitutes a violation of Section 76 and 87(2) of the *Labour Relations Act, 1995*.
7. It is the submission of the Responding Party that as a result of the contravention of the Act by the Applicant the representation vote which took place on May 18, 1996 did not likely reflect the true wishes of the employees in the bargaining unit. The Responding Party submits that as a matter of policy the Board should condemn conduct of a partisan nature by one party directly adjacent to the polling area. It is submitted that the intimidation of having an officer or official of one of the parties attend outside of the polling area and accost individuals as they approach the voting area is the type of conduct which deprives employees of the ability to freely express their true wishes. The unanimity of the vote and the fact that Micks spoke with each voter as further suggests that the nature of the interchange between Micks and the voters deprived the employees of their ability to freely express their true wishes.
8. The Responding Party requests that in light of the Applicant's violation of the Act that the Board should dismiss the Application pursuant to Section 11(2) of the Act.

4. On June 10, 1996, a hearing was convened to deal with the responding employer's statement of representations.

5. On considering the statement of representations, and the submissions of counsel at the hearing, the Board ruled, orally, that the responding employer had failed to make out a *prima facie* case for doubting the validity of the representation vote as an expression of the true wishes of the employees or for the relief it sought. The Board therefor dismissed the responding employer's request.

6. Taking the employer's allegations at their highest, it has done no more than assert that on the day the vote was held and outside of the building where the polling station was located, a representative of the applicant trade union "accosted" or "stopped" employees coming to cast their ballots and spoke with them for an average of ten minutes each. On the plain and ordinary meaning of its own words, the employer asserts no more than that the applicant's representative approached and spoke to potential voters. There is nothing in the employer's pleadings which supports its subsequent bald assertion that the union's representative had intimidated, coerced or otherwise improperly affected the voluntary expression of the wishes of any employee who sought to exercise his/her right to cast a ballot in this vote, or which suggests either that voters were deprived of the ability to freely express their true wishes or that the result of the vote does not reflect the true wishes of those employees.

7. Some years ago, it was the Board's practice to impose a "silent period" prior to a vote. This required the parties, including the affected employees, not to engage in propaganda or electioneering with respect to the vote for 72 hours prior to the day of the vote or on the day of the vote itself. The Board's experience with the "silent period" was not a positive one. Indeed, the Board eventually concluded that the "silent period" created more problems than it solved (see, for example, *Tops Food Market*, [1982] OLRB Rep. Dec. 1951). Eventually, in November 1984, the Board formally changed its policy and issued a formal policy statement as follows:

BOARD POLICY RELATING TO THE SILENT PERIOD

In July of 1983, the Board reviewed its policy relating to the normal 72 hour "silent period" preceding a representation vote and was of the opinion that litigation over alleged breaches of the "silent period" often prolonged certification proceedings unnecessarily. The Board concluded that the imposition of a "silent period" before a representation vote should be dispensed with, but considered it advisable to implement this change of policy for a trial period of one year. Having closely monitored the impact of the change during this trial period, the Board has decided to adopt the policy of not imposing a "silent period", as its regular practice. The Registrar of the Board, nevertheless, retains the right under section 68(j) of the Board's Rules of Procedure to impose a "silent period" in particular cases.

The Board reiterates that the dispensation of the "silent period" should not be seen as permitting "wide open" campaigns by parties to a vote. Rather, it is intended to eliminate litigation over technical violations. The Board will, of course, continue to deal with any submissions or complaints alleging that a representation vote has been improperly affected by the conduct of the parties or other persons.

8. Since then, the Board's practice has been to hold votes without imposing a silent period, and there has in fact been relatively little litigation arising out of electioneering prior to a vote.

9. Even in the "silent period" era, the mere presence of a trade union or employer representative near a polling area, whether their presence was extraneous or not, did not necessarily cause the Board to conclude that the vote was not likely to disclose the true wishes of the employees. Nor did propaganda or electioneering outside of the "silent period" necessarily have such an effect. (See, for example, *Anderson Metal Industries Inc.*, [1981] OLRB Rep. Apr. 415; *Associated Tube Industries Ltd.*, [1981] OLRB Rep. Dec. 1705; *Windsor Machine & Stamping Limited*, [1982] OLRB Rep. May 791.)

10. There was no silent period imposed in this case. There is nothing either generally or under the *Labour Relations Act, 1995* which prohibits propaganda or electioneering with respect to a vote under the Act. Indeed, the use of propaganda in electioneering to influence voters is a common feature of votes in a democratic society. That is the case generally, and, as the Board's "outside of the silent period" jurisprudence demonstrates, has also long been the case under the labour relations legislation of this province.

11. Under the present Act, it is more important than ever, that the Board, and the parties and employees, have confidence that the results of a vote under the Act reflect the true wishes of the employees. This does not mean that people cannot be seen, or that they cannot speak to employees about the vote. Nor does it mean that people, be they representatives of the employer, representatives of a trade union, or employees themselves, can do or say whatever they wish. Propaganda and electioneering are one thing; intimidation, coercion or undue influence is quite another. The former is permissible; the latter is not.

12. Whether the line between acceptable and improper conduct has been crossed will depend on the circumstances, including who did or said what, where, to who, and in what circumstances. Anyone who wishes to impugn the results of a vote under the Act bears the onus of stating and proving

their case. The Board will not engage in, and will not allow anyone else to engage in, a fishing expedition in that respect.

13. In this case, all that was alleged by the employer is that a representative of the applicant stopped and spoke to voters outside of the building in which the polling station was located. There is nothing obviously wrong with that. There was no suggestion on what was said, or circumstances which might arguably suggest that the union representative did or said something which could arguably have intimidated, coerced or unduly influenced voters. In that respect, for example, the mere fact that the vote result was what it was does not *by itself* suggest that the union representative did or said anything improper.

14. There are no other issues between the parties.

15. Accordingly, having regard to the materials filed and the agreement of the parties, the Board finds that:

all employees of Citipark Inc. in Metropolitan Toronto employed for not more than 24 hours per week and students employed during school vacation, save and except supervisors, maintenance foremen and auditors, persons above the rank of supervisor, maintenance foremen and auditors, office and clerical staff, and persons in bargaining units for which any trade union held bargaining rights as of May 3, 1996,

constitutes a unit of employees appropriate for collective bargaining.

For the purposes of clarity, the Board notes that the parties have agreed that employees in the classification of "special constable" are excluded from the bargaining unit so long as the employees in that classification perform the same and included duties and responsibilities of the auditor classification.

16. More than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.

17. Accordingly, a certificate will issue to the applicant.

18. The Registrar is directed to destroy the ballots cast in the representation vote taken in this application following the expiration of 30 days from the date hereof, unless a statement requesting that the ballots not be destroyed is received by the Board from an interested party before then.

1526-95-U Syndicat canadien de la Fonction publique et sa section locale 2519, Applicant v. Corporation Le Lycée Claudel, Responding Party

Collective Agreement - Duty to Bargain in Good Faith - Remedies - Unfair Labour Practice - Union alleging violation of duty to bargain in good faith where employer deciding not to ratify what had been negotiated between its collective bargaining representatives and those of union - Board rejecting union's argument that collective agreement had, as matter of fact, been concluded between parties - Board, however, deciding that employer's failure to develop adequate bargaining mandate falling short of obligation to make every reasonable effort to conclude collective agreement - Employer directed to develop unconditional proposal for collective agreement and return to table and bargain with union in good faith

BEFORE: *K. G. O'Neil*, Vice-Chair.

APPEARANCES: *James G. Cameron* for the applicant; *Monique Couture, Terry McEwan, Patrick Floyd* and *Jean Claude Nadon* for the responding party.

DECISION OF THE BOARD; May 2, 1996

1. This is a complaint alleging a breach of section 15 [now 17], the duty to bargain in good faith and make every reasonable effort to conclude a collective agreement. The applicant will be referred to as CUPE or the union in this decision and the employer as the Lycée or the school.

2. In June, 1995 the Lycée decided not to ratify what had been negotiated between its collective bargaining representatives and those of the union. The union's position is that either a collective agreement had been concluded at the table, or in the alternative that it was a breach of section 15 for the Board of Directors of the Lycée not to ratify the agreement presented to them by their negotiators. By contrast, the employer says that their negotiating committee never had more than a mandate to recommend acceptance, and that there were sound, lawful, reasons to reject the collective agreement.

3. Five days of hearing were held during which the evidence of 10 witnesses and argument were heard and a substantial number of documents were received into evidence. In the end, the facts necessary to this decision are not substantially in dispute, although there were differences of point of view, recollection and experience in the evidence of various witnesses - and fundamental differences over what conclusions should be drawn from the facts. It is my assessment that the evidence before me was given honestly by all the witnesses, but that there were important differences in how some of them perceived what was occurring. Where necessary I have noted how I have viewed any differences in the witnesses' evidence. I have carefully considered all the evidence and submissions, even if not explicitly set out below.

4. The Lycée Claudel is a private francophone school in Ottawa, incorporated under the laws of Ontario, and accredited by the Government of France as a French school abroad. This accreditation is fundamental to the school's character, and its ability to attract students from families in the foreign service and the international community living in Ottawa. Part of the accreditation process is the negotiation of an agreement with an agency of the French government, A.E.F.E., which brings with it the benefits of teaching staff, financial and institutional resources from the French government, as well as obligations on the part of the school to maintain standards acceptable to the authorities in France. To ensure the standards, there are several measures in place, including the provision of a school director (le proviseur), and school inspectors directly from France. The agreement touches on matters also dealt with in the parties' negotiations, such as the composition of certain required school committees.

5. The Lycée serves approximately 600 students from the primary to secondary level. The bargaining unit involved in this case is composed of approximately 40 of their teachers, those not directly paid by the Government of France.

6. The existing collective agreement between the parties was due to expire on August 31, 1994. Notice to bargain was served on June 8, 1994, and proposals were delivered by the union to the outgoing president of the Board of Directors in November, 1994. The employer established its negotiating team in December, 1994, after the elections for the Board of Directors in November, 1994. The team was made up of the newly elected President, Yves Chartier, the Treasurer, Christophe Alviset, and the Ex-Treasurer, Henri Robcis. The evidence indicated that the committee was established by calling for volunteers who were able to take on the negotiating. In the opinion of the employer witnesses, the members of the team were not there in their roles as President and Treasurer, for example, but as members of the Board of Directors. The union's team was made up of Gilbert Balsamo, Local President, François Le Maître, Local Vice-President, Gilles Boumard, Local Secretary and Joanne Harvey, Union

Adviser. When Ms. Harvey was seconded to another assignment between April and June, she was temporarily replaced by Jean-Marc Bezaire.

7. Bargaining took place between January and June, 1995. Application for conciliation was made on March 7, 1995 by the union. An April 10, 1995 vote of the union membership authorized strike action and mediation took place on May 15 and 16, 1995. There had been seven bargaining sessions before then and there were three after mediation.

8. Although in the union's view negotiations were too slow in getting started, and unproductive for too many months, the negotiating teams succeeded in agreeing on all the language issues by the end of mediation and all the monetary items shortly thereafter. There was no memorandum referring to ratification by either side. The parties had agreed early on in negotiations that they would sign off articles as they agreed to them instead of keeping minutes of each meeting. Almost all the clauses were initialled by each side, with the exception of a few items, including a salary grid, agreed to late in negotiations. Another item not initialed, but considered and agreed to by both parties was a definition of the word committee, drawn from a dictionary, indicating that a committee has the power to propose but not to decide. The meaning of the signing off will be dealt with in more detail below, but it is common ground that the negotiating teams had agreed on all the issues on the negotiating table. The problem which lead to this dispute only became clear at the ratification stage.

9. The problem between the parties is that the union team was of the view that it was negotiating with the employer itself, and that those at the table for the employer, being the President of the Board of Directors and its present and former treasurer, had the power to bind the corporation. However, the employer's committee was clear that it only had the power to recommend to the Board of Directors, and that ratification was necessary before a collective agreement could be signed. They saw their mandate as negotiating something agreeable to both committees and returning to the Board of Directors for acceptance or rejection.

10. When the committees had finished their negotiations, a document in the form of a collective agreement with a formal signature page was prepared from a computer disk provided by the employer team, and the union took it to its membership for ratification. It was accepted by the union membership, on the recommendation of their negotiating committee, by a wide margin.

11. A few days later, members of the negotiating teams of both sides met for supper, on the union's invitation, to celebrate their work. Although somewhat uncomfortable with the invitation himself, partly because he knew the agreement could be voted down, Mr. Chartier accepted out of politeness. At the end of the supper, the union presented the document setting out all the issues agreed to, with the union signatures in place, to the employer. Testimony differed somewhat about whether Mr. Chartier, the President of the Board of Directors, was ready to sign the agreement at that moment, but it is clear that he did not sign it. It is equally clear from the testimony of Messrs. Balsamo and Le Maître, two members of the union committee present that night, that they knew that it had to go to the Board of Directors before being finalized. They were advised by members of the employer committee of the date of the next meeting when it was to be presented. However, the union side thought this was just a formality, and that there was no chance of its being rejected. No agreement had been rejected by the Board of Directors at the ratification stage before. As well, members of the union team had sat as faculty members on the Board and seen collective agreements for the support staff bargaining unit ratified with little discussion, to the point that they believed it would always be so. Otherwise, they said they would not have put it to their members to be ratified, or invited the employer team to dinner until the employer had ratified.

12. The Board of Directors held a meeting on June 27, 1995; consideration of the collective agreement was on the agenda. Also on the agenda was an item concerning the school premises, the

upshot of which was that a proposed, and much needed, move of the school to better premises would not take place. The evidence is clear that the school is in a very bad state of repair and not large enough to comfortably house the current number of staff and students. How to solve this problem had been discussed for years. Negotiations with the Ottawa Carleton French Language School Board were undertaken and on May 23, 1995 an agreement was arrived at which involved an exchange of properties which would have enabled a move, on condition of an environmental review. After the environmental review, the school board rejected the agreement. This rejection was announced at the Board of Directors meeting directly before they considered the teachers' proposed collective agreement.

13. Copies of the proposed collective agreement had been distributed to the directors in advance of the June 27 meeting and they had heard very brief reports about negotiations at meetings prior to June. From those discussions Mara Sfreddo, a member of the Board of Directors, had heard mention of salaries and the percentage increase and knew why the administration thought principal teachers, about which there were new provisions in the proposed agreement, were a good idea. But there had been no in depth discussions. The employer team had consulted somewhat with the school's directors and administrator but not after May 15 when the bulk of the negotiations took place.

14. It was the uncontradicted evidence of the employer that the Board of Directors' attention had been largely taken up with the question of the proposed move of the school to better premises between December, 1994 and June, 1995. It was a subject that had been discussed on and off for years, and it was the general view that this time the move was really going to happen. For his part, Mr. Alviset, the Lycée's treasurer, thought the move was practically certain, and this had an impact on what he was willing to agree to at the table. The move would have meant more space and the ability to increase enrollment or offer day-care and kindergarten services, thus increasing the school's revenue. He was of the view that there would not be a problem putting the agreement in place as signed by the parties at the table.

15. By the time of the meeting to consider the proposed collective agreement, the Board also had information to the effect that enrollment was declining for the first time in the history of the school. Mr. Alviset's assumptions had been based on increasing enrollment.

16. Mr. Alviset presented the document to the Board for their approval. A discussion ensued, which involved the directors giving their impressions of the agreement, which were for the most part negative. Given the tenor of the discussion, neither Mr. Alviset nor Mr. Chartier, the other member of the negotiating team present, felt it advisable to put a formal motion, as it was clear to them that the agreement would not be ratified.

17. The consideration of the collective agreement by the Board of Directors was continued two days later, on June 29, for over three hours. The collective agreement was reviewed page by page, up to, but not including, the monetary portions. However, the directors were aware of the overall percentage agreed on, about 17% over four years. At that point Mr. Alviset had to leave, and the four remaining directors continued to discuss the matter for another 45 minutes, at which point they decided not to ratify. Mr. Alviset had expected discussion to continue at another meeting on June 30, 1995. However, he was called the following day to be informed that it would not take place, much to his dismay.

18. The evidence indicates that there were a number of matters of concern to the Board in the proposed agreement. In general, Mr. Chartier said the members of the Board thought it posed a risk to the financial health of the school. This was because of the cost of the proposed agreement in the context of the decreased enrollment and the problems with the premises. As well, portions of the agreement were seen to be in conflict with the convention with France. This too had financial implications, because if the convention was jeopardized, the school's status as a French school abroad would be threatened, along with the funding that went with it.

19. The rejection of the contract was communicated to the union by letter dated July 4, 1995. The members of the union negotiating team who testified were shocked by the rejection, and this complaint followed within a week.

20. Although the union objected, the Board admitted evidence of what transpired after the rejection, as relevant to the employer's theory of the case that it was not acting in bad faith, but for legitimate reasons in rejecting the contract. Members of the Board of Directors wished more detailed calculations. In September the Board of Directors appointed Mr. Jean Denys Archambault to continue negotiations with the union and authorized the retention of a consulting firm to more fully cost the proposals. Mr. Archambault gave evidence about what he saw as the problems with the collective agreement, but with the exception of a few general areas, there is no evidence as to whether or not those rejecting the memorandum in June had precisely the same concerns. Mr. Archambault was not on the Board of Directors in 1995, although he had served on the Board of Directors and as a member of its negotiating team in previous rounds of negotiation.

21. Although Mr. Alviset had been convinced there were adequate funds to pay for the settlement at the time he agreed to it, when he testified, his view had changed. He was dubious that the suggestions of union counsel, such as raising tuition by a percentage larger than the usual annual range of increase, were viable ways to finance it because of their potential negative effect on enrollment. He noted that it is a time of uncertainty of employment among civil servants in Ottawa, many of whom have their children in the school. As to suggestions to increase enrollment, Mr. Alviset said this is out of the question until another solution is found to the problem of the premises. An architect is currently being consulted about renovations to the current premises and the possibility of finding space for a kindergarten. Mr. Nadon, the administrator, was of the view that the decline in enrollment was linked to the rise in tuition, especially because of job loss in the Ottawa area among the parents. Also of concern from the revenue side is that funding from both the Governments of Canada and France is being decreased.

22. Having set out the basic facts of the dispute, it is appropriate to expand on them in the course of considering the arguments presented by each side as to the application of section 17 [formerly section 15] which provides as follows:

17. The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

The union's first argument is based on the idea that the employer's team either had a mandate to conclude a collective agreement or acted as if they did, leading the union into mistakenly believing they did. Thus it is argued the Board should find that the document ratified by the union is the collective agreement between the parties, and the employer should be ordered to sign it.

Actual Mandate

23. Dealing first with whether the employer's team actually had a mandate to conclude a collective agreement, the evidence from the employer witnesses was clear that they thought they had no more power than any other committee of the Board of Directors, i.e. the power of recommendation rather than the power of decision. There is nothing before the Board about the meeting where the employer committee was struck or the mandate given which would contradict the evidence that the actual mandate given was a mandate to negotiate and recommend, rather than a mandate to return with a concluded collective agreement. Several employer witnesses testified that it was the long-standing practice of the Board to only give a power of recommendation to the committee, a view consistent with the evidence of the members of the employer's committee for this round.

24. By contrast, there was evidence from Mr. Fleuriau-Chateau, a former president of the Board of Directors and member of the employer's negotiating committee, that when he negotiated he believed he had the power to conclude a collective agreement and would have resigned from the Board of Directors immediately if what he had negotiated had been rejected. This evidence was given in a credible manner, and there was no reason offered in final argument for me to discount it. However, given that this was for a separate round of negotiations, it does not outweigh the evidence given specifically about this round and the mandate given to this employer team. There is nothing to say that the mandate need be the same during each round of negotiations, or that participants during different rounds (or the same round for that matter) would all share the same understanding of their role. The cases bear this out. See for example the *Professional Institute of Public Service Canada*, [1978] OLRB Rep. Jan. 18, where the employer's negotiator resigned because ratification was not a rubber stamp as he had thought it would be. In any event, although the past practice is relevant to the understanding which each team brought to the table, it is not determinative on the point of whether or not the employer team in this round had an actual mandate to bind the employer.

25. It is my finding from the evidence before me that the employer's negotiating team constituted in December 1994 was not mandated specifically to conclude a collective agreement, but rather to negotiate and report back to the Board of Directors. The two main negotiators for the school, Yves Chartier and Christophe Alviset, gave credible evidence to this effect, and it was not contradicted by other evidence.

Apparent authority

26. Despite the lack of a specific mandate did the actions of the employer team nonetheless bind the Corporation such that a collective agreement is now in place? Both the common law of agency and the jurisprudence of a number of Canadian labour boards recognize situations when someone negotiating a contract will succeed in binding a principal even though the negotiator does not have the actual authority to do so. This is referred to as having apparent authority. See, for example *Vic Starchuk Associates*, [1980] OLRB Rep. April 516, *Steds Limited*, [1992] OLRB Rep. Jan. 67 and *G.A. Baert Construction*, [1971] OLRB Rep. Dec. 766. On the facts before me, the question is whether the conduct of the Board of Directors in allowing its team to act in the way it did amounts to a situation where the team had apparent authority sufficient to bind the employer. That is the conclusion argued by the union, while the employer says that both parties knew that the parties' agreement at the table was subject to ratification, and the union was wrong to believe that there was no substance to that step on both sides. Whether the employer team had the apparent authority to conclude a collective agreement and whether the agreement reached was subject to ratification are essentially questions of fact.

27. We will discuss the cases in more detail below, but the general concept of apparent authority can be briefly summarized: where an agent is placed in a position by a principal and given the authority to act in a way which indicates that an agent has authority to bind the principal, and a third party relies on that to change its position, the principal will be bound by the actions of the agent. However, a third party cannot rely on a representation of an agent's authority if the third party knew or ought to have known of the limited nature of the agent's authority, or if the third party ought reasonably to have been suspicious of the agent's apparent authority. See, for example, Cameron Harvey's *Agency Law Primer* at pp. 53 and ff.

28. The union says that by its actions, the employer represented to them that its negotiating team had a mandate to bind the corporation. The union argues its representatives relied on this in having its membership ratify the agreement and communicating that to the employer, thus seriously compromising its bargaining position if the employer is allowed to repudiate the agreement. Further, the members of the negotiating team testified that their knowledge of the past practice of the school

lead them to reasonably believe that review of the settlement by the Board of Directors was nothing but a formality, and that there was no chance that a negotiation concluded by the President and Treasurer of the corporation would be repudiated. Thus, it is said that the employer should be held to the bargain made by its negotiating team.

29. Reference was made to Article 6.01 of the By-laws of the Corporation which provides that the president and the treasurer, among others, are officers of the corporation, agents of the directors and represent the Board of Directors or the school. Thus, Messrs. Chartier and Alviset have the authority under the corporation's By-laws to act as agents of the school, by reason of their office. Although I have found above that they did not have the express or actual authority to conclude a collective agreement on this occasion, the fact of their corporate authority to act as agents gives a formal basis to the view of the union bargaining committee members that they did have the authority to bind the corporation. However, the general authority to so act was not argued to mean that in every situation the President and the Treasurer would bind the corporation. If the President and the Treasurer are by virtue of the By-laws the agents of the Board of Directors, the Board of Directors is capable at law of limiting the mandate of its agents.

30. The evidence about the initial meetings of the two bargaining teams establishes that the employer team introduced itself, and it was clear to the union that its members were bargaining on behalf of the employer. Beyond that, the communication was less explicit on the subject of mandate. For example, the evidence does not establish that it was ever said that they were just a committee of the Board of Directors, with no authority to bind the corporation, or that all agreements at the table were tentative and subject to ratification by the Board of Directors. Nor was it ever stated that they had the power to conclude a collective agreement. Mr. Chartier said that although it was not expressly stated that they only had a mandate to negotiate it was implicit in their presentation and he believed the procedure had been established in advance.

31. The witnesses for each side remember different aspects of the later discussions at the table. Mr. Balsamo recalls that, the two team's having agreed to signing off articles, when they came to the first occasion of agreement, he made a comment to the effect that this was serious, that it committed everyone. Although management witnesses could not recall that in particular, it was not denied. I accept Mr. Balsamo's evidence on this point, but it is not, in the end, an answer to the problem before us, because to say that it committed them begs the question as to what it committed them. Did it commit them to recommend the agreement for acceptance, or to having agreed once and for all? Clearly for the union side, there was never any question on that point: everyone was clear that the union would be taking the matter back to its members for ratification and that signing off did not mean final acceptance. Thus, it is not the signing off itself which can be the determinative factor.

32. The employer witnesses recall references by the union team to each of them taking the matter back to their superiors, although the details of the exchanges were not clear in their memory. Again, these were not denied by union witnesses, but it was their evidence that there was never anything clearly stated to the effect that the employer committee could not bind the Board of Directors, or that the agreement might not be ratified at the Board of Directors. Although the union adviser, Ms. Harvey, said there was no mention of ratification when she was at the table, she was not there for the meetings at which most of the signing off was done, and it is clear from the evidence of the members of the team who are employees and were there throughout the negotiations, Messrs. Balsamo and Le Maître, that they knew at all times that it would have to go to the Board of Directors. The dispute is over what would happen at the Board of Directors.

33. Mr. Chartier acknowledged, as Ms. Harvey had testified, that there were times when the employer team indicated that they needed information from the proviseur or other officials of the

employer or members of the Board before signing of, e.g. on the subject of principal teachers, although there were times as well when they did not. As to the proposals entitled “Administration Proposals” they were drafted by Mr. Alviset, and did not come from the Board or the administrative employees of the school.

34. There was evidence about other rounds of negotiation, between the school and both the teachers’ and the support staff bargaining units. The evidence demonstrates that the agreed on items were presented to the Board of Directors and on each occasion, the Board of Directors ratified the collective agreements agreed to with the negotiating teams, be they teacher or support staff. The evidence established that often there was very little discussion. Mr. Le Maître’s experience was that how easily something passed often depended on who presented it. Mr. Balsamo had served on the Board of Directors as a faculty representative as well, and his view was that once the deal was made at the table, it would always be ratified by the Board of Directors. The members of the union team were excused from the Board meetings during the discussion prior to the ratification of previous teachers’ agreements, but had been present for discussion prior to the ratification of support staff agreements. Mr. Nadon, the school’s administrator testified that the amount of discussion depended on how much was at issue and whether the changes involved language issues or monetary ones, the latter requiring less explanation. The members of the Board of Directors who testified for the employer were of the view that they always had had the right to reject a proposed collective agreement.

35. Ms. Harvey had negotiated with the Lycée before and there were a variety of procedures in her recollection. Sometimes there was a protocol explicitly setting out that the agreement was subject to ratification, as is usually the case when she negotiates with lawyers. None of the members of either bargaining team were lawyers on this occasion and no protocol was signed. Ms. Harvey was clear in her own mind that when the President of the Lycée signed off an article, that was an act of the corporation. This was reinforced in her mind by the fact that at times during the negotiations the employer team left to consult with the proviseur (the director of the school) before signing off.

36. As stated above, the evidence about the previous rounds of negotiation is not determinative, but it is relevant to the reasonable expectations of both parties. The one thing that emerges very clearly is that with the exception of the union representative, all the witnesses knew that the agreement had to go to the Board of Directors before it was signed. The difference between the two is whether or not it was just a formality or a substantial step in the process.

37. The cases which deal with the question of whether ratification can be assumed to be a complete formality, rather than carrying with it the risk of rejection, are not many. Employer counsel referred us to *Board of Education for the City of Hamilton*, [1993] OLRB Rep. April 308. In that case, the employer’s negotiating team had been given a specific mandate by the Board of Education prior to school board elections. When the time came to ratify what their team was recommending, the newly elected Board refused to ratify, citing changed circumstances. The union committee had concluded from its lack of problems at the ratification stage in the past, that ratification was a formality. Management had given some warnings to the union, before ratification, in the form of urging the conclusion of negotiation before a budget speech of the Premier’s, and again after the union reported that their members had ratified, in the form of an explicit statement that there might be difficulty obtaining ratification, a difference of fact on which union counsel relies to distinguish this case. The facts are distinguishable in that respect and also because it was not an officer of the Board who was negotiating for the employer, and the agreement was explicitly subject to ratification. However, on the point of whether or not there was a risk of defeat on ratification, or whether it was a rubber stamp, the case is quite similar. In concluding that the union’s assumption that there was no chance of rejection was unwarranted the Board had this to say at paragraph 47:

47. ... The fact is, whatever Ms. Cooke's [the union negotiator's] experience may have been, there was no guarantee that the newly-elected Board would cede its political authority and simply "rubber stamp" the recommendation of its subcommittee - any more than there was a guarantee that the union membership would ratify the settlement proposed by union officials. Nor is it surprising that when exercising the prerogative reserved to it by the terms of the Memorandum, the Board would consider all of the relevant circumstances, including the Board's financial difficulties and the impact of the Premier's recent announcement.

and further at paragraphs 62 and 63:

62. In the instant case, it is important to note that the January 16 settlement expressly contemplates that it will be subject to ratification. *Prima facie*, the terms of that settlement mean what they say. The deal is provisional; and, OPEIU [the union] seems to have taken it for granted that its members retained a veto, and were entitled to reject the settlement if, for some reason or other, they found it wanting. It seems to be acknowledged that that is a political process in which the OPEIU membership had a free hand to disregard the recommendation of their negotiating team. There is nothing to suggest that the Board ever gave up a reciprocal right to reject, and there was no representation from its negotiating committee to this effect. Obviously, the Board, too, is a "political body" with responsibilities to its electorate and its own view of the employer's interests - especially in the wake of an election, and in light of the employer's escalating economic difficulties.

63. The Board is not a private sector enterprise, where the authority of the negotiating agent may be much more closely fused with that of the "principal". The relationship between the full Board and its sub-committee is different, and, quite frankly, whatever the past practice might have been, it was unwise for OPEIU to treat the full Board as a mere "rubber stamp", or a proforma process of automatic approval - especially when, as early as January 16, the Board's negotiators were worried about the shifting economic circumstances, and warned Ms. Cooke that the Premier's speech would impact upon bargaining. We do not suggest that an elected body has an entirely free hand to resile from its agreements or float with the political winds; however, it is entitled to exercise its own judgement in accordance with the negotiated terms of settlement. There was no agreement to ratify, but merely an undertaking on the part of the employer's representatives, to *recommend* ratification. Those parts of the settlement would be meaningless if it were not contemplated that the Board had an option to reject.

See also *Central Park Lodges*, [1988] OLRB Rep. May 454.

38. In *Municipality of Casimir, Jennings & Appleby*, [1978] OLRB Rep. June 507 there is an example of a single round of bargaining with two formal attempts at ratification before the municipal council. On the first attempt council rejected. After a strike, negotiations were concluded and agreement reached on all matters in the presence of The Reeve and Deputy Reeve, apparently the most senior municipal officials. Because of their presence at this final round and because council ratified the content, only refusing to implement because of a pending judicial review, a breach of section 15 was found and the employer ordered to sign the document agreed to at the table. As part of the Board's finding at paragraph 23 that the parties intended that the results of their final efforts at the table would be the execution of a collective agreement, the Board notes apparently with approval, that the union's negotiator operated on the assumption that the discussions in the presence of the Reeve and Deputy Reeve, the senior elected officials of the municipality, were the equivalent of a representation that ratification by Council was merely a formality and that all that remained to be done was to provide a form to the understandings suitable for execution. Because the main issue in this case was the failure to implement the terms agreed on, this latter fact is not decisive in the case. However, it is illustrative of how the surrounding circumstances will support or detract from a finding on whether ratification is just a formality. In *Hamilton Board of Education*, as noted above, they pointed in the other direction - to a finding that the step of ratification was not just a formality. However, it is clear that an assumption not based on a representation, verbal or by conduct, is not enough to show that ratification was just a formality.

39. In argument union counsel listed the following elements as establishing that there was a mandate, real or apparent: the nature of the employer team itself, including the president and the treasurer; the length and frequency of the negotiations - more than 10 meetings over six months; the seriousness of the negotiations, there having been give and take and serious negotiation over many items; a strike vote had been taken; conciliation went on for two days; the fact that what got the negotiations restarted were proposals from the employer; the fact that in April the employer appeared at the table with a document entitled "Administration Proposals" which shows that they were coming directly from the administration; all items were signed off by the presidents of both sides with the exception of the salary grid which came directly from the employer. Union counsel queries how it is that the Board of Directors posed no questions during the whole course of negotiations, even with a strike vote and two days of conciliation, if their team had no mandate to negotiate a collective agreement. Otherwise, he suggested it would mean the employer sent people without the authority to negotiate to the table.

40. In sum, the union says that the employer team did nothing to change the impression that they were negotiating with the employer itself or their belief that ratification was only a formality. There is not a significant body of law on whose onus it is to establish the bargaining authority of the opposite side and no clear guiding principle is obvious. Each case must be determined on its facts and the potential combinations of facts are many. See, for example, *Stadco Forest Products*, [1981] 1 CLRBR (B.C.), where it was held that a mistake about the negotiating authority of the other side was the responsibility of the party making the error; it was that party's duty to ascertain the scope of the negotiating authority of the opposite negotiator. By contrast, in *John Inglis*, [1974] CLRBR 481, the B.C. Board seemed to put the onus on the negotiators with limitations on their authority to communicate what those limitations were, rather than the other way around. However, that conclusion was subject to the caveat that where there is good reason to suspect the authority of the opposite party, the other party must inquire further.

41. It is the Board's view that there is no settled onus in this respect. Prudent negotiators will make their own authority clear at the outset of negotiations and inquire about the other side's authority explicitly. Where the situation is left less clear than that, as in the facts of our case, it will be judged in light of the particular circumstances of the case. As indicated above, whether or not there is apparent authority sufficient to bind the employer is a question of fact on the balance of probabilities.

42. On balance, it is the Board's view that the knowledge of the President and Vice-President of the union Local that the agreement had to go to the Board of Directors for approval is fatal to the idea that the employer negotiating committee had apparent authority to finally conclude a collective agreement. Although it may be understandable that the union team thought they were dealing with the people of influence on the Board, and that there was little or no chance of their recommendation being turned down by the Board, the evidence is not sufficient to warrant a finding that it was safe to assume that ratification by the Board was not a real second step. For instance, it seems odd that the teacher members of the Board of Directors would have absented themselves for the discussions before ratification of teacher agreements in the past if ratification was nothing but a formality. It is my view that the reason the members of the union team had come to the conclusion that ratification was a foregone conclusion had less to do with the representations of the employer negotiating team, since there is no evidence of any explicit representation that they had the power to bind the employer, but with their experience in the past. No other collective agreement had ever been defeated at the Board. It may be understandable that the union drew the inference from that history that this time would not be an exception. However, we find that there was a mutual understanding that each side had to take the matter to its principal and that this understanding was never subject to any representation at the table that there was a limitation on the power of the Board of Directors to say no, rather than yes. All of the evidence together indicates that, impressive though the individuals on the employer's team may be, individually

and by reason of their office, committees of this Board of Directors could not safely be thought to have the power of final decision. The employee members of the union bargaining team knew this to be the case for every other committee of the Board of Directors, including those on which they had sat in the past. Their assumption about the difference in the power of this committee was rooted in both their past experience in getting contracts ratified, and their knowledge of the network of influence within the school and the Board of Directors. When the result was at odds with their experience, members of the union team were surprised and shocked. Nonetheless, we do not find that there is sufficient evidence of a representation of apparent authority before us that we should find that the employer negotiating team bound the employer to the agreement reached at the table.

43. The above leads to the conclusion that a collective agreement has not been concluded between the parties, and it is unnecessary to deal with the question as to whether the lack of employer initials on a number of items means that the document would not meet the Act's requirement that a collective agreement be a document in writing.

Duty to make every reasonable effort to conclude a Collective Agreement

44. The union's alternative argument is that even if a collective agreement was not finally concluded at the table, it was a breach of section 15 to not ratify. The union argues that the manner in which the Board of Directors considered the document put to it is insufficient to meet the duty to bargain in good faith and make every reasonable effort to conclude a collective agreement. Union counsel argues that the cursory treatment of the monetary portion in the absence of its author, and treasurer, as well as the ex-treasurer who had been part of the team, as well as the failure to continue discussing the matter on June 30 point to a surface consideration of the document. As counsel put it, it is one thing to bargain hard, it is another thing to not even give your own representative the chance to explain such a significant part of their six months of work.

45. Furthermore, it is argued that in not recommending the agreement for acceptance, or posing a resolution Mr. Chartier's conduct fell below the standard required by the statute.

46. In arguing the portion of the case on apparent authority, union counsel put it at one point that the employer team had apparent authority, unless the Board of Directors was sending people to the table without authority. He queried how it was that the Board had asked no questions the entire time if the committee did not have the mandate to bargain. We have found that the committee had a limited mandate to bargain, and not to conclude a collective agreement. But this does not answer the questions implicit in those raised by the union, which are essentially about the sufficiency of the mandate to meet the obligation to make every reasonable effort to conclude a collective agreement.

47. As well, the union argues there was insufficient reason to reject the proposed agreement. In the union's view, it was far from being obvious that the school would go bankrupt, and the later calculations of Mr. Archambault and the Board's consultants were not the basis of the decision to reject, since they did not exist at the time.

48. The employer argues that this is simply a case where circumstances have changed as in *Hamilton Board of Education*, cited above. The evidence in their view clearly establishes that they were willing to meet and seriously negotiate, and remain willing to do so. Failure to reach an agreement should not be found to constitute bad faith.

49. On the question of the failure of the Board of Directors to ask questions earlier, the employer argues that the agenda was heavy and that collective bargaining was often at the end of the agenda. Because of other concerns such as about the premises, there was not time to engage in earlier discussions in depth.

50. Counsel for the employer argues that nothing should be made of the fact that Mr. Chartier did not propose a motion to adopt, or put the matter to a vote. He did not disavow the settlement, and Mr. Alviset put it to the Board of Directors for their approval. Counsel submits that the Board of Directors then had substantial reasons for not ratifying and no breach should be found.

51. These arguments put in issue both the period prior to the signing off of the proposed agreement at the table, in respect of the mandate of the committee from the Board of Directors, and the failure to ratify itself.

52. The relationship between mandate and ratification is ideally very straightforward. They are the beginning and end points of a successful bargaining process. If there is a clear mandate, adhered to by a negotiator or committee, and a tentative agreement reached within that mandate, problems with ratification ought to be rare. However, as the cases demonstrate, what occurs between mandate and ratification is not always so linear. But at a minimum, reasonable efforts to conclude a collective agreement and good faith require that there be substance to the authority and mandate of a team, so that progress toward a collective agreement is real and not illusory. Even where agreements are made at the table subject to ratification, the statutory duty continues to apply, as the cases make clear. A formal mandate with no content is problematic as is the repudiation of agreements within the mandate without sufficient reason. Adequate authority should mean for instance, at the very least, that if an employer's proposal was adopted in its entirety by the other side, there would need to be a very good reason why it was not ratified.

53. The relationship between mandate and ratification is part of the assessment of whether the duty to bargain in good faith has been breached. The Alberta Board put the proposition as follows in *Barber Industries & Allied Workers* 3 CLRBR (2d) 288 at page 297:

When assessing the obligation to bargain in good faith, the Board must look at the question of ratification along with the parallel notion of a mandate. The legislation permits an employer to bargain through a bargaining committee and allows an employer to stipulate a process of ratification. However, there is a duty to provide any such bargaining committee with clear direction about what the employer wishes to achieve and is willing to accept. This is an important part of the duty to bargain in good faith and make every reasonable effort to enter into a collective agreement. ...

An unexplained failure to ratify a proposal negotiated by a committee, ostensibly acting within their mandate, calls into question either the *bona fides* of the refusal to ratify or the adequacy of the mandate given to that bargaining committee. This is particularly so where the employer's committee has made the proposal to the trade union, rather than the other way around. It is also particularly so for a small employer with close links between the bargaining committee and the persons responsible for ratification.

In that case, the Alberta Board found deficiencies in the communication between the principal and the committee in terms of mandate. As remedy, the employer was ordered to give clearer directions to its negotiators on certain points, to make the importance of certain items clearer in negotiations and to table an offer which did not require ratification.

54. We will deal first with the period prior to the failure to ratify. The evidence before the Board established little in the way of content of the mandate of the employer committee, although it established that the employer's initial proposal was to simply renew the old collective agreement, a proposal which no doubt would have been ratified by the employer if it had been accepted by the union. The employer committee consulted with members of the administration and made brief reports to the Board about progress of negotiations. Each meeting of the Board of Directors at which negotiations were mentioned was the subject of evidence, but there is no evidence that there was any decision by the Board of Directors about what they were willing to accept, even in the broadest of outlines, beyond the simple renewal of the expired collective agreement. In that respect, the mandate seems to have been vaguely

defined, if at all. Although it appeared to the union committee that consultation was ongoing with the administrative staff of the school, the evidence indicates that what there was was brief and occurred early on in negotiations. And during the period when the bulk of bargaining was done, there appears to have been no communication at all between negotiators (the committee) and principal (the Board of Directors) about what the Board of Directors was willing to accept. In sum, the evidence bore out what the employer pleaded: questions were not sent to the Board before being signed off, and it was never informed of the content of the negotiations until the meetings at the end of June.

55. Between January and April, negotiations were mainly taken up with the employer responding to union proposals. The employer did not make its own proposals until April for language items, which were a response to the union and a summary of the progress made to date, and until May for monetary ones. Although the monetary proposals were based on information that had been obtained from the administration such as the current salary, seniority and qualifications of the staff, they seem to have been developed in isolation from any specific mandate from the Board to offer them. The evidence also indicates that the employer did not have detailed information about what some of the proposals would cost until after the tentative agreement was reached, although extensive work had been done on the salary grids. Although it is pleaded that the budget provided a mandate of 2% for the budget years 1995/96 (September 1, 1995 to August 31, 1996) which was exceeded by the negotiators when they agreed to 17% over four years, there was no evidence that the budget had been finalized by the time the financial proposals were made, or that they were in fact a specific part of the committee's mandate.

56. Although the above state of affairs is hardly ideal, it is not very surprising, nor probably unusual. This is a small school, with parent volunteers on the Board of Directors and the employer's negotiating committee. In this particular case the volunteers had no experience in collective bargaining. The Board is convinced that all the individuals concerned were acting in good faith in the personal sense of the words and in the sense of having the intention to recognize the union and conclude a collective agreement. But section 15 can be breached even where there is good faith, because of the companion obligation to make every reasonable effort to conclude a collective agreement. See *De Vilbiss (Canada) Limited*, [1976] OLRB Rep. March 49. The real question is whether, on balance, what happened amounts to reasonable efforts to conclude a collective agreement.

57. To my mind, this is the area in which the factors listed by union counsel in arguing apparent mandate accumulate to become quite problematic. The fact that the two committees engaged in serious negotiations over six months when in fact the employer side had no specific instructions as to what was acceptable means that there was no guarantee that the parties were not engaged in a fruitless exercise - when the object of section 15 is to ensure that negotiations bear the fruit of a collective agreement if reasonably possible.

58. It is clear that the first real in-depth look at negotiations by either principal happened at what both committees thought was the end of bargaining. This was the practice of the parties during the earlier rounds of bargaining. And it had not caused problems before; it had been good enough until this round. On the union side it is the standard way to put a settlement to a group of employees, particularly where a mandate to negotiate has included specific proposals or goals at the front end. But, the ratification process is not perfectly symmetrical, as the Board has observed in *Central Park Lodges*, and *Hamilton Board of Education*, cited above. On the employer side, especially, as here, where there is no practical difficulty in communicating with the principal, it is my view that the apparent failure to develop a mandate which included content acceptable to the Board of Directors falls short of making every reasonable effort to conclude a collective agreement. The fact that it had not been necessary in the past, does not make it any less true that there was an essential element missing in the employer's approach. The lack of authorization for specific content, by the time of the important exchanges at and after mediation at the very latest, prevented there being any security that the horizon of conclusion of a

collective agreement was not endlessly receding although it appeared to be close at hand. Neither side is required to have a complete mandate at the outset. However, sufficient communication between principal and negotiator is necessary for informed progress towards a collective agreement to be possible. When matters are clearly coming to a head, as they were at conciliation and after, a clearer mandate was necessary for the employer to be found to be making every reasonable effort to conclude a collective agreement.

59. This is not the end of the matter however. The period during which the matter was being considered by the Board of Directors must be considered in order to answer the further question of whether, in any event, it was a breach of the section 17 duty to fail to ratify the agreement. The uncontradicted evidence about the change of circumstances concerning the school's premises right before the vote on the collective agreement is an important intervening fact. The union did not challenge the timing of the employer's knowledge about the cancellation of the move due to the repudiation of the agreement by the French Language School Board. Thus, the evidence before me is that these two items were concurrently before the Board of Directors. As of May 23, the Board, and Mr. Alviset who was putting together the employer's financial proposals, thought they had a contract which would mean that the school was moving - with the expansion potential and increased revenue that went with that. The fact that the move was no longer possible on June 27 meant that the financial assumptions Mr. Alviset had used in making the May 23 financial proposal were no longer applicable. Whether or not there was any obligation on the employer to make its proposals conditional on the move going through is not something that was argued before me, and therefore I make no comment thereon. Members of the union team were aware there was a question of moving during negotiations, although it was not part of negotiations. On the evidence and argument before me, however, it is my view that the fact that the move did not go through as anticipated is sufficient change of circumstances to explain the employer's lack of ratification without a finding of a breach of the Act, given the monetary implications of both.

60. There were also several instances of problems with the interplay between the agreement with France and the provisions of the tentative collective agreement which were real and add to the finding that there were reasons of substance for the Board to reject the collective agreement. For instance, the evidence was convincing that the agreement at the table about the composition of the evaluation committee, an important committee to both sides, meant that the proviseur could not convene the committee without breaching either the agreement with France or the collective agreement, depending on how he decided to constitute the committee. I have taken into account the evidence, which I accept, that there is some leeway in how one convenes committees under the agreement with France, but this leeway does not persuade me that the concerns about the conflict in the composition of the committees lacked substance, or were a device to avoid a collective agreement. Although the issues surrounding the potential conflict with the agreement with France may be more easily solvable than some of the employer's testimony implied, they are nonetheless real and important to the functioning of the school. Having found that the ratification step is a real one on the employer side, I am not of the view that there was an obligation to ratify with those problems in the agreement.

61. On balance, it is my view that the failure of the agreement which would have enabled the move is a fact which has overtaken the deficiencies in the mandate of the employer. It is impossible to know now if the deficiency in the employer's mandate is in fact responsible for the failure to ratify. It is just as probable that even if the mandate had been properly formed, and the employer committee had agreed to something within the mandate, ratification would not have been forthcoming because of the new information about the failure of the move. Thus, although the failure to develop a mandate with content acceptable to the Board of Directors objectively falls short of making every reasonable effort to conclude a collective agreement on the employer side, the Board is not persuaded that it is in fact responsible for the failure to ratify.

62. What is the appropriate response from the Board in these circumstances? We have found that the development of the mandate on the employer side fell short of the duty to make every reasonable effort to conclude a collective agreement, and thus a declaration to that effect is in order.

63. The union wishes the Board to go further and order the employer to sign the document ratified by its members. Where a breach of the Act has been found at the ratification stage and the Board finds that all the issues had been settled at the table, the Board has given such a remedy. See, for example, *Municipality of Casimir, Jennings and Appleby*, [1978] OLRB Rep. June 507 and *Northwest Merchants Ltd. Canada*, [1983] OLRB Rep. July 1138. However, in general, the Board has been reluctant to impose collective agreements, or even portions of them, because of the distortion of the intended statutory process, based on voluntarism, which that would represent. See, among others, *Treco Machine and Tool*, [1982] OLRB Rep. Dec. 1954. The Board has not done so where it has found there were lawful reasons for the failure to ratify, such as in *Hamilton Board of Education*, cited above. Where a breach is found at the mandate stage, the remedy is more likely to be like that given in *Barber Industries*, cited above: an order to return to the table with a proposal the principal will ratify.

64. The employer argued that since the recent amendments to the Act which were part of Bill 7, it was no longer within the Board's power to impose a collective agreement. Bill 7, which received Royal Assent on November 10, 1995, before the hearings in this matter had been concluded, changed section 91(4) which formerly read:

91.-(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting, the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of;
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally; or
- (d) an order, when a party contravenes section 15, settling one or more terms of a collective agreement if the Board considers that other remedies are not sufficient to counter the effects of the contravention.

to what is now section 96(4), which reads as follows:

96.(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the

employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

It can be readily seen that subsection (d) of the former section 91(4) is notable by its absence. The employer argued that the Board's remedial response could not include the settlement of any terms of the collective agreement, or the imposition of one, and it was said the granting of the union's request for relief would require that. To the extent that the employer's argument suggested that it was no longer within the Board's power to find that a collective agreement existed as a question of fact, or that all the terms of one had been agreed to and therefore should be executed, the Board does not agree. However, given our findings above, we are not in that situation. And it is not necessary to finally determine the extent of the effect of the above-noted amendment. Since we have found that the failure to ratify was not unlawful, and in light of the Board's previous jurisprudence, we are not of the view that it is appropriate to grant remedial relief in respect of the terms of the eventual collective agreement itself.

65. The appropriate response in the Board's view is to declare that section 15 has been breached by the employer in that its failure to develop an adequate mandate falls short of the obligation to make every reasonable effort to conclude a collective agreement. As remedy, the employer is ordered to develop an unconditional proposal for a collective agreement and return to the table and bargain with the union in good faith. By unconditional, the Board means a proposal that the Board of Directors is willing to accept and authorize its president to sign without further ratification. Both parties should then address the changed situation in good faith at the negotiating table.

66. This is not to say that the parties are returning to zero. It is clear that there is much of the agreement negotiated at the table that has little or nothing to do with the changed fiscal situation, the agreement with France or any reason said to have warranted the rejection of the agreement by the Board of Directors. And it is also clear that the union had convinced the employer's negotiators of the acceptability of their proposals in good faith, which included their arguments about the gap between their salaries and those of teachers in the public system. Echoing the remarks of the Board in *Hamilton Board of Education* at paragraphs 69 to 77, the union has some good arguments to make in defense of its proposals, move or no move. The place to reinforce those arguments now is at the table or in whatever appropriate forum the school milieu provides. Both parties continue to be under an obligation to comply with section 17.

67. For the reasons given, the complaint is allowed to the extent indicated. The Board will remain seized to deal with any difficulty implementing the above decision.

0275-95-R; 0528-95-U Christian Labour Association of Canada, Construction Workers Local 52, Applicant v. **Covertite Eastern Limited**, Responding Party v. Sheet Metal Workers' International Association, Local 47, Intervenor; Sheet Metal Workers' International Association, Local 47, Applicant v. Covertite Eastern Limited and Christian Labour Association of Canada, Construction Workers Local 52, Responding Parties

Certification - Construction Industry - Employer Support - Unfair Labour Practice - CLAC seeking to displace Sheet Metal Workers' union as employees' bargaining agent - Board concluding that employer's support of CLAC clear and significant and qualifying as "other support" within meaning of section 15 of the Act - CLAC's application for certification dismissed

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *Orval R. McGuire* and *H. Peacock*.

APPEARANCES: *Ron Rupke, Derek Schreiber* and *Rob Juhasz* for Christian Labour Association of Canada, Construction Workers Local 52; *J. Raso* and *Ross Mitchell* for Sheet Metal Workers' International Association, Local 47; *Lynn Harnden, Bruce Warner* and *Jim O'Hara* for Covertite Eastern Limited.

DECISION OF THE BOARD; May 10, 1996

1. This is the continuation of an application for certification and an unfair labour practice complaint. The applicant in the certification application, who will be referred to as "CLAC" in this decision, seeks to displace the intervening incumbent union, referred to as "Local 47" below. The responding party employer will be referred to as Covertite.
 2. These applications were the subject of an earlier decision of the Board, differently constituted, dated June 19, 1995 in which the Board considered the status of reaffirmation documents filed by Local 47. This decision deals with unfair labour practice allegations relevant to the certification application.
 3. Local 47 takes the position that CLAC should not be certified by the Board because of the involvement of both the employer and working foremen in the campaign, and what it is alleged to be intimidation and coercion of the roofers in support of CLAC and against Local 47. CLAC and Covertite vigorously dispute these allegations.
 4. The hearing of this matter took place during 7 days spanning several months. There were several areas of dispute as to the facts, which will be dealt with where necessary in the course of the decision which follows. In assessing credibility, the Board has had regard to the usual factors, including the ability to recall, the manner in which the testimony was given, the capacity to resist the pressures of self-interest when testifying, and what is most probable in all the circumstances. Minor inconsistencies and natural erosion of memory over time do not usually detract from overall credibility.
- * * *
5. Covertite is a roofing and sheetmetal contractor operating in the Ottawa area. It has been bound to a provincial collective agreement covering roofers and sheetmetal workers for a number of years. The hands on, day-to-day, management of the operation is done by two of its four owners, Bruce Warner and Jim O'Hara, assisted by a superintendent. Mr. O'Hara also works as a superintendent. His duties include project scheduling and safety. He makes the decision as to which foreman will work on which project and the size of the crews. There are from four to nine working foremen with the company,

depending on how much work there is. Their duties will be dealt with below, but we note here that they form a significant portion of the bargaining unit of 20 people.

6. Work was very slow in early 1995. Management made the decision that it was no longer able to keep its steady people on through advances and shop or office work, because it could not afford it. The periods during which it had done such things in the past had usually been a month or 6 weeks, and the down times were getting longer and longer. Mr. O'Hara testified that he knew there was work available, but the company wasn't getting it because their wage rates were not competitive. Although they were bidding on many jobs, their success rate was only about 3%, when they needed 20 to 25%.

7. This view of the availability of work was shared by Robert Juhasz, a part-time working foreman. Having done pre-bid inspection for the company, and not seeing himself or Covertite working on the jobs once the job closed, he concluded the problem was not lack of jobs. Talk among the employees about the problem of getting more work in early January, 1995, included talk of possible contract concessions, such as a ratio of pre-apprentices to roofers more favourable to the company, and other alternatives, such as working four days for three days' pay. The company was not happy with a contract restriction on the ratio of pre-apprentices to roofers, and made this known in late 1994 and possibly earlier to at least some of its employees.

8. On February 6, 1995, Mr. O'Hara met with the working foremen about how slow things were and were likely to remain. He was upset at losing a bid to non-union contractors, one which he had shaved to the minimum. Mr. O'Hara suggested to the assembled foremen that they had better go down and see what they could get from Local 47 - meaning if there was any relief from the collective agreement provisions. The men seemed agreeable to that suggestion, and several went to talk to Local 47 that morning.

9. When the working foremen met with Local 47 on February 6, they asked for a ratio of pre-apprentices more favourable to the company so the company could hire more workers at a lower wage rate. Ross Mitchell, Local 47 business representative, said he could not give more pre-apprentices, but when the men were laid off, they should go organize non-union companies. Mr. Mitchell also said they should do what they had to to survive, but if he got complaints he would have to look into it. At least one of the foremen took that to refer to a one to one ratio for pre-apprentices.

10. The same afternoon, February 6, 1995, the four owners of Covertite and the superintendent met with representatives of Local 47, including Ross Mitchell, the business agent. Mr. O'Hara said he was "trying to get through to them what had changed in five years" - compared to 1990, jobs three times the size carried one third the overhead. Mr. Mitchell told them "Do what it takes to get a job", referring to the ratio of pre-apprentices to apprentices, if none of the men complains. He added that if there was a complaint from the men he would have to act on it. Mr. O'Hara had hoped that the meeting would give him something to work with in computing the labour rate for jobs six to eight months down the line on which they were bidding.

11. Mr. Juhasz was not satisfied with the union's solutions and decided to call CLAC, as he had heard about it in the Windsor area where he had previously worked. Material sent by CLAC shortly thereafter contained advice to the effect that if management was involved in an organizing campaign, it wouldn't go through. Mr. Juhasz discussed this with the other working foremen over coffee, telling them that if anyone wanted to kill the campaign, the thing was to say management had been involved. Further contact with CLAC resulted in further information, including information about terminating the bargaining rights of the current union. Mr. Juhasz discussed the CLAC material with working foremen and key men.

12. In early March, Mr. Juhasz was called by Local 47 to meet with Ross Mitchell, which he did on March 6th. Mr. Mitchell gave him to understand that the executive wanted him brought up on charges, presumably under the Union Constitution, for organizing for CLAC, and that in order to avoid that he needed a statement from Juhasz that he was not a CLAC supporter. Mr. Juhasz testified Mr. Mitchell asked him to put in that the company had motivated him to look into CLAC. Mr. Mitchell testified he merely asked him if there was company involvement, as he asks all his men. Mr. Juhasz wrote out a statement, indicating that the company was not behind his seeking an alternative, and saying he thought the CLAC issue was dead, as at the time, he thought that the others did not want to pursue CLAC, but wanted to work something out with Local 47. However, later that week, he was approached by another working foreman expressing interest in pursuing CLAC again, and he set up a meeting with a CLAC representative for Saturday, March 11th. This was eventually rescheduled for March 18th, as he was not able to get in touch with everyone for the first date.

13. In late February, Mr. O'Hara had told the estimators to work with a labour rate of \$26 an hour when \$31.50 is the rate they carry under the collective agreement. Even with this, they were only successful on one contract by the time he got back from vacation on March 13th. The company had previously cut all the overhead items they could think of, including selling vehicles, cutting out shop time, and cellular phones. Mr. O'Hara testified that they were running out of things to cut.

14. During this period Bruce Warner, one of the other Covertite owners, was participating in negotiating, on behalf of the employer association, the collective agreement to which Covertite is bound. Rumours were that the union would accept a wage rollback, and Mr. O'Hara wanted to pin down how much, as this would be very helpful in bidding. He was gambling on \$5 to \$8 hour rollback. He said he approached each of the working foremen individually to hear their idea of what they had heard from the union about rollbacks or a wage freeze. He wanted to talk to them individually so that he would get a clearer idea of what each thought without the influence of others' responses. On cross-examination, he said what he wanted to know was what the leaders would do, not what the men wanted. When asked if he bypassed the union and went directly to the workers, he said, "We chased all avenues." Mr. O'Hara said that he posed questions to each of the foremen with whom he met as to what they had heard through Local 47 about negotiations. The rollback rumours they had heard were for sheetmetal workers, but they had not heard what to expect for roofers. When asked if he or Mr. Warner posed questions to the men about CLAC, he said he did not believe so.

15. Robert Strenkowski is a part-time working foreman, who was supportive of Local 47, and did not respond favourably to Mr. Juhasz' initial invitations to meet with CLAC. Mr. Strenkowski met with Mr. O'Hara, Mr. Stocker and Mr. Warner on March 13th in the Boardroom. He said the first question, from Mr. Warner, was why he did not want to attend the meeting with CLAC. He gave his reasons. Mr. Warner did not testify. Mr. O'Hara said it was possible Mr. Strenkowski had been asked this and added he asked many of the men with whom he met "why wouldn't they keep an open ear to any suggestions out there that were legal". Mr. Strenkowski said this was about a week or two before the meeting he did attend with CLAC. We accept Mr. Strenkowski's evidence that he was asked why he would not meet with CLAC, and that he answered the question. Mr. Strenkowski says that Mr. O'Hara then asked him how much he made last year, presumably referring to the decline in business, and he said none of his business. Mr. O'Hara persisted and Mr. Warner told him to shut up about it. Mr. O'Hara denies asking this. Mr. Warner asked if another foreman than Rob arranged a meeting with CLAC, would he go, and he said he'd have to think about it. He also said that he was asked what the men expected from Local 47 and he told him they were asking for no raise for the first two years. Mr. Strenkowski says the mention of CLAC came up in the conversation considerably before the discussion about bargaining. Mr. Strenkowski said Mr. O'Hara had been after him about how much he made and the issue of the pre-apprentices ratio since the fall of 1994.

16. There was a meeting on Saturday March 18th between Derek Schreiber for CLAC and 8 working foremen. There was a dispute in the evidence as to whether Mr. Juhasz had announced this on the company pager, as a foreman's meeting (Strenkowski's evidence) or whether it just said "important meeting" (Juhasz' testimony). In the end, it is unnecessary to resolve this detail. It is abundantly clear that the organizing drive was carried out initially through the working foremen and whether or not the pager was used in precisely the manner alleged is not ultimately of crucial importance here.

17. At the meeting on March 18th, the working foremen discussed what CLAC could do as compared to Local 47. The main item was that CLAC negotiates directly with the employers rather than province wide. No cards were signed that day. Mr. Strenkowski recalls that the thrust of the discussion was to the effect that foremen and roofers would keep their salary, but all the classifications beneath them would be eliminated to allow for cheaper labour. At one point in the discussion, the CLAC rep was asked to leave so the Covertite employees could discuss the matter among themselves. They wanted further information and decided to have another meeting which would include roofers other than the working foremen as well.

18. Mr. Strenkowski said that the following morning at coffee at the restaurant near the shop, there were managers and workers there and one question stuck out; how was the meeting on Saturday. It is unclear whether this question was asked on Monday, March 13th or the following Monday, March 20th, but Mr. Strenkowski's evidence was clear that it was asked. The company evidence was to the effect that it was possible it was asked, and Mr. O'Hara put the grouping referred to as on March 13th, the first day he was back from vacation. We accept that it was asked, and in the final analysis, nothing turns on which Monday it was asked. There had been a meeting scheduled for the Saturday before the 13th as well, and the inference that the company knew about a meeting on the Saturday is equally valid, regardless of which Monday it actually was. The evidence is not conclusive on whether there was a specific reference to CLAC. However, the evidence taken as a whole is convincing that there is no great barrier in terms of information flow between the working foremen and the managers. There is little doubt that the company knew that its men were meeting with CLAC. We have found above, for instance, that Mr. Strenkowski was asked about meeting with CLAC in the March 13th meeting with the three managers described above. In the context of this meeting, Mr. O'Hara was asked in re-examination who raised the subject of CLAC. His answer was that he had actually received a phone call from men on two occasions and he had told them he could not get involved, that if they wanted to discuss it further, they would have to talk to one of the other men in the company. He did not say when this was, but in context it appeared to be before the meeting with Mr. Strenkowski, and it generally supports the idea that Mr. O'Hara and managers were aware of the presence of CLAC.

19. The next meeting with CLAC took place on Sunday, March 26th at a soccer club with a CLAC representative, Derek Schreiber, the majority of the working foremen (seven out of the nine), and Covertite employees, about 20 to 21 in all. Working foremen were to tell their men about the meeting; Mr. Juhasz did not personally inform the men, so he did not know if the working foremen had excluded anyone. Fourteen people signed CLAC cards that day. They did not apply for certification that day as it was not a working day. Mr. Strenkowski was not informed of this meeting and did not know what went on at it. He had spoken up against CLAC at the earlier meeting, had expected to be informed of the next meeting and was clearly dismayed that he had not been.

20. On March 22nd, the provincial negotiating teams had reached a tentative settlement, which did not include Covertite's hoped for improvement in the ratio of pre-apprentices to roofers.

21. On April 12th, there was a mandatory ratification vote for the roofers' collective agreement. Mr. Juhasz testified that at the ratification meeting, roofers were asked to sign papers pledging allegiance back to Local 47 and only after they signed did they get a ballot. Mr. Juhasz explained to

some Covertite employees that it did not matter if they re-signed, that there would be a vote in any event. He said he supposed one could have refused if one wanted to with 500 roofers around you. And he did not watch every person to see if anyone who did not sign was allowed in. Mr. Mitchell testified not everyone signed, and that he gave out the cards because he had heard that CLAC was around talking to roofing companies.

22. Robert Beauchamp testified that his foreman, Ed Beckett, was at the ratification meeting, as were all the other working foreman and most of the roofers. Mr. Beckett talked to Mr. Beauchamp and Mr. Thibeault that night in support of CLAC. To Mr. Beauchamp, he said it would be better to have another union, to get a cheaper labour rate which would lead to more work. Mr. Beauchamp took this other union to be CLAC. Mr. Beckett talked to him about CLAC on a job site in Hawkesbury as well, where he made the same points to the effect that there would more work if there was a cheaper labour rate.

23. The company was successful in getting a job in Hawkesbury for April, but only after carrying \$20 a day as the room and board rate in the bid, rather than the \$54 a day provided in the collective agreement. Mr. O'Hara had to decide what crew to give the work to, a decision he makes depending on what roofing system is involved and the skill of the foreman and the crew. He spoke to foreman Ed Beckett before the two others who would be on his crew, to tell him there was only one other job on the books, being a roofing system that Beckett and his crew knew nothing about. He said he was trying to work him into this last job, but wanted to talk to his two main men, Jacques Thibeault and Bob Beauchamp before assigning it.

24. Mr. O'Hara said it was standard to talk to the men before a job about the room and board he carried, although other witnesses said it was more unusual to have him meet with the workers; usually it was Mr. O'Hara and the foreman who met. In any event, Mr. Beckett, and his two men, Mr. Beauchamp and Mr. Thibeault, met with Mr. O'Hara on April 17th. There is significant variation in the three accounts we heard of this meeting (from O'Hara, Beauchamp and Thibeault). However, there is also substantial common ground. No one had perfect recollection of the events, and it is clear that there was overlap in the subjects covered in this conversation and one that occurred a week later, causing understandable confusion when the witnesses tried to recount the facts several months later. It is not necessary to resolve all the disputed testimony. The important points have to do with whether or not the men were told at the meeting that there was further work for them after the Hawkesbury job and whether CLAC was discussed.

25. There was also considerable testimony suggesting that the employer was making various arrangements regarding pay with individuals outside of the parameters of the collective agreement. In the end, it is not necessary to deal with that as an issue in this case, and thus, much of that evidence has been omitted. The evidence was referred to in argument only to demonstrate that Ed Beckett, the foreman in question, was taking the side of management in the discussion.

26. As to the conversation on April 17th, we have balanced the various accounts and we have concluded that the men had been told there was a possibility of future work, and that the foreman said in Mr. O'Hara's presence that they would be better off with another union. Both of these subjects were in the context of Mr. O'Hara's discussions of how "tight" the job was, and that in the past it had gone non-union. We have concluded that Mr. O'Hara made no guarantee of future work, and may well have said that the Hawkesbury job was the last one on the books for that crew. However, we have also concluded from all the testimony, that O'Hara did mention the possibility of an 800 square foot job elsewhere after Hawkesbury.

27. Mr. Thibeault recalls that Mr. O'Hara talked about wages saying the job was pretty tight and that he could not afford regular wages according to Local 47 rates. Mr. Thibeault says Mr. O'Hara

said if they worked with another union or non-union, that could bring the wages down. He thought he meant CLAC because he had heard it discussed at the ratification meeting.

28. When asked about the allegation that he had made reference to the other union in the meeting on April 17th, Mr. O'Hara said he was referring to a Quebec union that had asked for \$20 a day on a job in Lachute which was 15 minutes further away than the Hawkesbury job, to show that another union thought \$20 a day for a job even further away was fair. In cross-examination, he said that he just used the Quebec union as a comparator, that \$20 is his interpretation of the collective agreement. He considers there to be a grey area in the collective agreement in respect of room and board in circumstances such as these. When asked why he would need to speak to Mr. Beckett first, if it was what the collective agreement provided, he said that he did not want them going down there thinking they were getting \$54 and then get \$20. Mr. Beauchamp does not remember anything about the Quebec union in this conversation.

29. Mr. Beauchamp said Mr. O'Hara said the job was in the hole before they started. On cross-examination by CLAC's representative, he said it was in this context that CLAC came up - that they would be better off with another union; more labour at cheaper rates being equated with more work. He was not sure whether it was Mr. Beckett or Mr. O'Hara who brought it up. Beauchamp says that Beckett talked about CLAC at this meeting and said that they would be better off with this union because the rate for labour was cheaper than the Local 47 rate, thus it would lead to more work. He said Mr. O'Hara and Mr. Beckett were agreeing with everything each other said. When pressed on cross by employer counsel, Mr. Thibeault said that CLAC was not mentioned on the 18th, just on the 25th in Hawkesbury.

30. Mr. Beauchamp said that Mr. O'Hara spoke about a \$7 student rate at this meeting and that there was no chance he was confusing this meeting with the exchange on the roof at Hawkesbury, about which more will be said below. Mr. O'Hara denies he made any reference to the student classification during this conversation. As well he denied saying that the company would have to change unions because they needed the cheaper rate of \$7 an hour. He says the first time he ever saw anything about another union was when he went to Hawkesbury (April 25) and read the literature that Local 47 had handed out. Mr. Thibeault says he recalls no reference to a student rate, just cheaper labourers.

31. Mr. Beckett did not testify, and Mr. O'Hara did not contradict the evidence of Messrs. Beauchamp and Thibeault about the role of Mr. Beckett in the conversation on April 17th. Although their evidence about Mr. Beckett's interventions in the conversation was not put to Mr. O'Hara in cross-examination, Mr. Beauchamp and Mr. Thibeault were challenged on the portion of the testimony related to Mr. Beckett in cross-examination and Mr. Beauchamp remained firm in his recollection that Mr. Beckett had raised the matter of the other union at the meeting on the 17th. Mr. Thibeault, however, conceded that the name CLAC had not been mentioned on the 17th. Neither Mr. Beckett nor Mr. O'Hara was called in reply to contradict Mr. Beauchamp. Thus, we accept that Mr. Beckett mentioned being better off with another union at the meeting with Mr. O'Hara and generally agreed with what Mr. O'Hara said throughout the conversation. There is no suggestion that Mr. O'Hara was absent for any portion of the conversation. However, on balance, we find that it is likely that CLAC was not specifically mentioned on the 17th, given that both Mr. O'Hara and Mr. Thibeault agree on that detail, and Mr. Beauchamp did not insist that CLAC's names was mentioned, saying that he understood that to be what Mr. Beckett meant by the other union.

32. Whether or not Mr. O'Hara specifically referred to CLAC or another union in a context that was a clear reference to CLAC, as we have found Mr. Beckett did in his presence, is not necessary to decide. However, the evidence taken as a whole is convincing that for months Mr. O'Hara had been speaking to his men to convince them to do something to get the labour rate down. Mr. Beckett had made the connection explicit between CLAC and getting the labour rate down as early as March 22nd.

Even if he did not use the name CLAC on April 17th, the reference was unmistakable in context. Whether or not Mr. O'Hara himself said anything about CLAC at the meeting of April 17th is not particularly important because he did so explicitly a week later, as will be discussed below. It would add to the union's case if Mr. O'Hara's intervention on April 17th were to be seen as explicitly favouring CLAC, since that was before Mr. Beauchamp signed a CLAC card on April 18th, and Mr. O'Hara's intervention on the roof was after his signing. However, numerically, it does not make any difference. Fourteen of the eighteen cards submitted by CLAC were signed well before this alleged intervention, and are sufficient to establish the forty-percent of the twenty member bargaining unit necessary to obtain a vote, (leaving aside for the moment the issue of the role of the foremen in obtaining the cards).

33. After the soccer club meeting Mr. Juhasz continued to try to get others to sign for CLAC on his own time. The evidence indicates some of it was on the signatories' working time. For example, the uncontradicted evidence of Jacques Thibeault and Bob Beauchamp was that they were asked to sign cards when they were working at Hawkesbury on April 18th. Mr. Beauchamp says he was approached to sign with CLAC by Mr. Juhasz and did because everyone else signed on the roof. His foreman was Ed Beckett, who was known to support CLAC. Mr. Beauchamp said if you want to work you "go with" the working foreman; you'd better agree with him or you won't get any work. Mr. Juhasz had gone to Hawkesbury on April 18th to deliver a generator, and agreed that he stayed for an hour talking to people about CLAC, but said he did not get paid for that hour. He was paid for the time to get there and back but not for the time in between. Five cards bear the date of April 18th.

34. On Monday, April 24th, representatives of Local 47 attended at the Hawkesbury job site to ask the men to sign reaffirmations of support. Estimates of how long they were there ranged from twenty to forty-five minutes. Mr. Juhasz said it affected morale a lot; the men seemed confused and did not believe him anymore about CLAC, and some did not want to talk about it anymore. Others were happy they were there. Foreman Beckett complained to Mr. Beauchamp about their presence, asked him what they were doing there and said they should be thrown off the job site. Mr. Beauchamp told him they were probably there to get people to rejoin Local 47. Mr. Beckett said basically they had already signed with CLAC and that Local 47 had no business disturbing the guys.

35. The following day, Tuesday, April 25th, Mr. O'Hara went to the Hawkesbury site late in the afternoon to see how the job was going. It was suggested that he already knew from foreman Beckett that men had re-signed with Local 47 when he arrived, but the evidence does not establish that. When he got to the roof, Mr. O'Hara says he was shocked that not much work had gone on in two days. He went to the foreman, Mr. Beckett, looking for an explanation. Mr. O'Hara testified that Mr. Beckett told him the union had been there for a couple of hours the day before and took the whole morale down. He added that the union had passed out some literature, which he gave to Mr. O'Hara.

36. Mr. O'Hara sat down and read the material and became quite angry, as he did not believe the union was being truthful with his men, some of whom are close friends. The points that struck him related to the suggestion that there was "no work out there", which he considered to be untrue, as he saw four of five tenders going out of the office each day. To his mind, there was lots of work; it was just that Covertite wasn't getting it. The other point that offended him was a suggestion that the company was making a lot of money at the roofers' expense. This upset him, since he said the company was making very little.

37. Although there are important discrepancies in the accounts of the conversations on the roof that day, again there is also important common ground. Mr. O'Hara testified that Mr. Beckett told him that the union had gotten the men to sign something. It is clear from his own testimony and that of Messrs. Beauchamp, Thibeault and Gravelle, that Mr. O'Hara then went around the site asking them, and Mr. Beckett, if they had signed something and/or what they had signed the day before. Mr. O'Hara

maintained that what he was worried about was whether they had signed a grievance about the room and board rate he was paying on that site. While that may also be true, it would have been clear from the material he read from Local 47, and the responses that the men gave him, that what had been signed was not a grievance. The written material he was given to read is about one subject only: stopping the potential loss of support to CLAC. It urges the men to reject CLAC, and in two different places asks them to sign a re-affirmation of their desire to be represented by Local 47. In this context, if Mr. O'Hara truly did not know by the time he left, as he testified, what the men had signed, it was because he was in a highly excited state.

38. The Local 47 material, as part of its attempt to persuade the workers to stay with them and reject CLAC, sets out provisions from CLAC collective agreements. One that caught Mr. O'Hara's attention was the \$7 rate for students. Mr. O'Hara acknowledges he said, "Do you know how much work we could get" with those rates. One other thing he recalls saying is "According to this you could tell me you want \$35 an hour," referring to the fact that the CLAC agreement was with a specific company, rather than a provincial agreement.

39. The point that is more controversial is whether Mr. O'Hara linked the signing to whether or not there would be any more work for that crew or individual members of it. When union counsel asked Mr. O'Hara if it was true that it was after Mr. Beauchamp and Mr. Thibeault told him what they signed that he said it was their last job, he said "No," but added that he did make them aware that there was not another job at that point. We have weighed this testimony together with that of Messrs. Beauchamp and Thibeault to the effect that there was a direct link between the two. Our conclusion is that Mr. O'Hara made it very clear that there would be less work if they stayed with Local 47 and more work if they went with CLAC, and that he preferred the idea of CLAC because of the low student labour rates. Mr. O'Hara, by all accounts, and as he appeared in the witness stand, is a voluble, excitable, and loquacious individual. He tends to make his points at length, and with emphasis. Taking only Mr. O'Hara's evidence, it is clear that he communicated to the men on the roof anger at Local 47, a preference for CLAC's rates and the idea that there was no more work, all in the same short conversation.

40. The evidence of Messrs. Beauchamp and Thibeault did not square on every detail, nor do they have total recall of the events, but their evidence was persuasive that Mr. O'Hara made it very clear that staying with Local 47 would have a negative effect on how much work they got in the future. Both Mr. Beauchamp and Mr. Thibeault recall for example that Mr. O'Hara linked staying with Local 47 with having to go work in Quebec, which for both of them was tantamount to no work, because they do not have the appropriate papers to work in Quebec. Mr. Thibeault testified that when Beauchamp told O'Hara he signed with Local 47, Mr. O'Hara said, quite upset, "That was a bad move.", and that if they still wanted to work, the only way was to go with CLAC. David Gravelle, the pot man, said that Mr. O'Hara told him it was his last day, without specifically linking it to the fact that he had told him he re-signed with Local 47. However, Mr. Gravelle concluded that was the reason.

41. There were various parts of the conversation which make the linkage between staying with Local 47 and less work less stark than might otherwise have been the case. For instance, we accept that Mr. O'Hara told Messrs. Beauchamp and Thibeault that if they stayed with Local 47, they would have to bring a pre-apprentice to work. This would be meaningless if they were never to have any more work. And this was not Mr. Beauchamp's last day working for Covertite; he was transferred to another job, and then came and worked on the Hawkesbury job again. Employer counsel also suggested that what was going on was a discussion of the pros and cons of CLAC and Local 47, and Mr. Thibeault agreed. As well, it was suggested that given that the workers did not lose their jobs after this, that they would have concluded that Mr. O'Hara was just blowing off steam. It is clear that the men knew Mr. O'Hara fairly well, and there may well have been some element of discounting what Mr. O'Hara said

because of his known personality. And although some of the men agreed that Mr. O'Hara might also have been upset that Local 47 had slowed down the job the day before, it was clear from all the evidence, that that was not the main event. Mr. O'Hara himself acknowledged that he was angry at what Local 47 distributed, as well as the progress of the job, and the possibility of a grievance about room and board.

42. In the end, the basic nature of the conversation is clear, and mostly common ground. Mr. O'Hara was upset about what Local 47 was saying to his men, he communicated his preference for CLAC wages and pointed out at the same time that this was the last job for the crew. Even if part of the recollection of Messrs. Beauchamp and Thibeault can be attributed to interpretation, rather than the precise words Mr. O'Hara used, the substance is admitted, and does not require a finding of exactly what words were used. In the end, there is not a different legal effect depending on whether Mr. O'Hara made the connection absolutely explicit, as in the version of Messrs. Beauchamp and Thibeault, or only obvious albeit indirect, as in his own. CLAC meant more work for them; Local 47 meant less.

43. There was also questioning of Mr. Thibeault which amounted to a suggestion that he had breached the exclusion order. Mr. Thibeault was reluctant to acknowledge that there had been a conversation in the hall, during a break in his cross-examination, involving Mr. Beauchamp and Mr. Juhasz. At a time after Mr. Beauchamp had finished his testimony, and in the presence of Mr. Juhasz, Mr. Beauchamp asked Mr. Thibeault what kind of roof they had put on in Hawkesbury. This was a matter that had arisen in Mr. Beauchamp's cross-examination. Mr. Thibeault said he did not remember, and Mr. Juhasz supplied the answer. There was a suggestion that Mr. Thibeault had indicated to Mr. Juhasz that there had been a separate conversation between Messrs. Beauchamp and Thibeault. However, Mr. Thibeault denied this, and Mr. Juhasz was not called to contradict this. In the circumstances, we do not find event this grounds to disregard Mr. Thibeault's evidence. Most of his evidence is in any event corroborated by others. This was a conversation in a public area, in the presence of someone, Mr. Juhasz, that both Messrs. Thibeault and Beauchamp knew was appearing with "the other side". Mr. Thibeault did not answer the question, and whether or not it was improper for Mr. Beauchamp to ask it in view of the exclusion order, it was after he had testified and was not something that went to the heart of the evidence or his or Mr. Thibeault's credibility, although it was relevant to it. As well it is not clear to us that it is the kind of area that Mr. Beauchamp would have known could infringe the exclusion order. Although the matter is of concern, and it is something we have taken into account, it does not change our findings of fact.

44. The morning following his visit to Hawkesbury, April 26, 1995, Mr. O'Hara went to get coffee at the coffee shop, and Robert Strenkowski, a part-time working foreman and another roofer were there. After chatting about other things for a bit, Mr. O'Hara asked them if they had seen the material handed out on one of the sites the day before. He asked their opinion, but neither offered one. So Mr. O'Hara gave them his. He told them he thought it was an unfair piece of literature, referred to the tenders they were pumping out, as contrasted to the idea in the literature that there was no work, and to all the cuts they had made in reference to the idea in the literature that all the company wanted was to make money. He also remembers something about the \$7 an hour. He gave his opinion of why the company wasn't getting work, including the presence of 3 companies from the Quebec side "stealing work on the Ontario side", because they were not bound to the collective agreement - a problem that didn't exist a few years previous. He also mentioned rumours of cash deals with people working for competitors while they collected Unemployment Insurance, and the fact that analyzing the jobs they did not get, he could see he would have to cut the labour rate in half, which is impossible. Mr. O'Hara put this in the context of the fact that these two men are his "close buddies", with whom he has been through a lot. He told them that at \$32 an hour, they were simply too expensive for him to send to the Hawkesbury job. He also let them know that there was a policy that foremen were not going to be jumping onto other crews anymore. Since he felt for them however, as they were each in a difficult

financial situation, he told them if they could get a pre-apprentice to bring along with them at \$12 an hour, it would bring the average hourly rate down to where he felt he could send them. He told them he would worry about the other crews who were not working later. The only significant difference between Mr. O'Hara's version of this and Mr. Strenkowski's is that the latter is definite that Mr. O'Hara asked if he re-signed with Local 47 and he said yes, while Mr. O'Hara says it was merely possible, and that he did not know why he would be asking Mr. Strenkowski that when he had not been on the site where he was worried about the grievance about room and board.

45. In general, Mr. O'Hara denies saying on numerous occasions that the union had done nothing for the roofers and was robbing them. Further he said he was neutral on which union all the way through the campaign. He said he would be quite content to have Sheetmetal, with concessions. The evidence is also clear that he knew after the settlement of March 22nd that the employer side had not gained the concessions he had hoped for from Local 47.

46. The union's case includes the assertion that the working foremen had such significant control over the lives of the other roofers that their participation in the CLAC organizing campaign means that neither the cards nor the vote are reliable indicators of the true wishes of the employees. In his evidence, Mr. Juhasz acknowledged that he relied fairly heavily on the working foremen to get CLAC in.

47. The evidence about the duties of the foremen was not in dispute, with the exception of some minor details. They perform duties typical of working foremen in the construction industry, both heading up crews and working on the tools. Management relies on them to know what is going on on the work sites and meets with them regularly to this end.

48. Crews working under a foremen vary in size, usually from two to ten. The crews are usually filled from the men with experience with Covertite, often through the foremen. If the foremen is short he will contact Mr. O'Hara or the other superintendent who will fill in the spots from other crews if possible, or authorize contacting the union for more roofers. Although they do not have the power to hire without consulting management, it is clear that the working foremen have significant input as to whether a person is hired or continued after a lay-off. It was agreed that on occasion the working foreman with the prior approval of the superintendent is authorized to call the union hall to select workers off the list.

49. Management has the right to overrule recommendations from its foremen. Only members of management, and not working foremen, have authority to discharge workers, except in the case of substance abuse or repetitive safety violations. In the latter circumstance, a foreman has the authority to dismiss, and Mr. Strenkowski said he once fired someone who had threatened his life. If someone is not working out, the foreman alerts the office, who decides on what is going to happen as a result.

50. The roofing industry has slow periods and periods when no one works. The regulars are recalled in May or June. Once the working foreman is recalled, management and the foreman will work together to recall his crew. In slow periods, foremen may work on the crew of another foreman or be assigned to other tasks in the office or repairing equipment.

51. Foremen have limited purchasing authority, essentially what is necessary to keep a job going; there is a nominal limit of \$100, which is not always followed.

52. The representation vote was held on May 23, 1995. Neither Mr. Thibeault nor Mr. Beauchamp voted.

* * *

53. With the above factual context, we turn to the assessment of the facts in light of the parties' arguments. Generally, the applicant and the employer take the position that nothing illegal took place and that the results of the vote should determine the representation application. In the alternative, it is argued that if a violation of the Act is found, sufficient time occurred between the violation and the vote that a secret ballot vote is still a reliable indication of the wishes of the employees. The intervenor, Local 47, on the other hand, argues that the above facts show clear employer support for the CLAC application, and undue influence by the working foremen.

54. There are potentially three layers of inquiry prompted by the above facts. First, was there employer support such that the Board may not certify the applicant pursuant to section 15 [formerly section 13] of the Act? If the answer to that is yes, it is unnecessary for the determination of the certification application to answer the second and third questions: did the participation of the working foremen in the organizing campaign mean that the true wishes of the employees are not ascertained from either the membership cards or the vote results? And, thirdly, were there any breaches of the Act, and if so, how should they be remedied?

Section 15

55. Section 15 [formerly section 13 of the Act] provides as follows:

15. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the *Human Rights Code* or the *Canadian Charter of Rights and Freedoms*.

56. The Board has made it clear in its jurisprudence that the purpose of section 15 is to preserve the arm's length relationship between unions and employers which is fundamental to the structure of the Act. A purposive, rather than literal, application of the section has found favour in the Board's jurisprudence, and is in our view the appropriate approach. Thus, not everything that an employer does that might be said to be supportive of an organizing campaign is sufficient to warrant the application of section 15. It is activity which is of a character or proportion such that it is reasonable to infer that employees have not exercised a free choice in the matter of the selection of a bargaining agent. See, for example, *Edwards v. Edwards*, (1952), 52 CLLC ¶17,027 and *Ontario Hydro*, [1989] OLRB Rep. Feb. 185 and *University of Toronto*, [1988] OLRB Rep. March 325. The purposive interpretation has meant that the provision of a list of employees to a union in an organizing drive by the employer contravened section 13 [now 15] in *Tri-Can*, [1981] OLRB Rep. Oct. 1509 but not in *Continuous Mining*, [1990] OLRB Rep. April 404, because in the former the trade union applicant had been formed to thwart another union's organizing attempts, while the applicant in the latter had a long history of arm's length collective bargaining with the parent of the employer.

57. Here, there is no evidence that when Mr. Juhasz contacted CLAC he was doing so on the initiative of the employer, or in collusion with the employer. The evidence is that Mr. Juhasz knew of CLAC from his own experience, and independently decided that an alternative to Local 47 was necessary. Subsequent to that, it is clear that the employer welcomed the idea. There was some suggestion in the employer's argument that management was not sure that CLAC would be good for the company, because the experienced roofers might be able to demand more than the rates in the provincial agreement. Whether or not any such reservations were operative, it is clear from the evidence that they were dwarfed by the prospect of lower labour rates which would average down the wages of the skilled roofers.

58. The first expression of the fact that the employer welcomed the idea of the CLAC campaign in evidence was the questioning of Mr. Strenkowski by Mr. Warner as to why he did not want to meet with CLAC, and whether he would be more interested if someone other than Mr. Juhasz organized a meeting. About six weeks later, Mr. O'Hara's intervention on the roof in Hawkesbury indicated clear support for the CLAC rates and linked them to a reversal of the dismal trend in getting contracts. It was argued that neither of these interventions was intimidatory, when seen in context. The employer argued that the lengthy, wide ranging conversation that the three managers had with Mr. Strenkowski is not indicative of his being intimidated to abandon support for Local 47 and support CLAC, when viewed in context. As to the conversation with Mr. O'Hara on the roof, employer counsel characterized this as a discussion of the pros and cons of Local 47 and CLAC, rather than intimidation. It is not necessary for the consideration of the application of section 15 to decide whether or not these interventions were actually intimidatory. Employer participation or contribution of support does not need to be intimidatory to attract the application of section 15. And it does not have to focus on punishing people for supporting the less-favoured union. Support can be given, as many of the cases show, by encouraging one side over the other.

59. Counsel for the employer also argued that the evidence does not show that the employer was trying to illegally interfere in the CLAC campaign. The intention necessary does not need to be a specific intention to do something illegal. And Mr. O'Hara appears, for instance, to have wished to stay on the right side of the law when he suggested to his men that they keep an ear out for any options that were legal. However, it is clear from the evidence that both Messrs. Warner and O'Hara intended to communicate to their employees, both at the foreman level (e.g. the conversation with Mr. Strenkowski), and below (the conversation with Messrs. Beauchamp and Thibeault in Hawkesbury) that CLAC would be good for them and the company and that Local 47 was not.

60. Both the employer and CLAC argued that the company's behaviour should not affect the results of the vote taken in this matter. It is clear that there are more obvious cases in the jurisprudence. For instance in *Coons Heating & Sheet Metal Limited*, [1978] OLRB Rep. June 525, the employer went looking for a union to organize his workers and gave his employees a union representative's business card and assisted in informing employees of a union meeting. Here, we have found that there is no evidence that the initiative for the CLAC campaign came from the employer. See also *Kinetic Construction Ltd. and Local #1 CISIWU and Victoria Labour Council*, unreported decision of the British Columbia Industrial Relations Council, No. C45/92, Case No. 6815, dated March 19, 1992. In that case an employer representative had been explicit that an application by CISIWU rather than the Carpenters would be unopposed, a more specific and overt message than here. Even if the support here is not as extensive or as overt as in some of the cases, it is our finding that it was clear and significant, and does qualify as "other support" in the terms of section 13.

61. What took place here was a clear expression by the employer of desire to have CLAC, rather than Local 47, represent its employees. It took place in a context where the employer had been emphasizing its precarious financial situation for months. Wage rates were a constant theme coming from Mr. O'Hara in particular; he had made it very clear to his men in a number of ways that the collective agreement rates were not in his view viable. Whether or not that message itself may be seen as simply being truthful in bad times, as employer counsel characterized it, it was put in another light in the context of the CLAC campaign. In the Board's view, when the message extended to specific support for another bargaining representative, the line set by section 15 was crossed. That is, "other support" has been provided in a manner in which the Board cannot be satisfied that the employees were freely, for their own reasons, choosing CLAC over Local 47, rather than simply respecting their employer's preference. The context of the "unaffordability" of the Local 47 wages, gave a specifically sharp and persuasive focus to the employer's expression of support for CLAC. The combination of circumstances amounts to pressure to vote for CLAC.

62. Employer counsel also underlined that the upshot of the employer's first overtures to its workers was a meeting with Local 47. While this is true, it is also clear that the employer did not receive the assurances it was looking for from Local 47. It is significant in our view, that the meeting with Mr. Strenkowski in which he was questioned as to why he would not meet with CLAC occurred within a week after Mr. Mitchell had told Covertite that he could not provide the concession on pre-apprentices that they were looking for. His communication to the effect that he would turn a blind eye as long as no one complained could not have been of significant comfort to the company. As well, Mr. O'Hara's intervention on the roof in Hawkesbury came after the new provincial settlement had been made without the concessions the company had sought. Local 47 was acceptable to Mr. O'Hara with concessions. When those concessions were no longer available for the life of the new collective agreement, there is no evidence that Local 47 was any longer acceptable to him. Certainly, the message he gave to his employees was that it was an obstacle to the company's viability.

63. It was also argued on behalf of CLAC that even if we found employer support, we should look to *Crowle Electric*, [1982] OLRB Rep. Oct. 1458, as a case where a representation vote was held, even in the face of employer support. The significant difference between this case and *Crowle Electric* is that the support shown by the employer in that case was for the incumbent, rather than the union applying to be certified. If the vote went for the incumbent in *Crowle Electric*, the Board would not be in the position of certifying a union in contravention of section 15. Rather, the result would be the dismissal of the application by the other union. We are not of the view that the option available in *Crowle Electric* is available on the facts of this case. The main basis for ordering a vote expressed in the Board's reasons was the fact that an incumbent is presumed to have majority support while it holds bargaining rights. That presumption obviously is inapplicable to CLAC which is not the incumbent in this case.

64. It was argued on behalf of CLAC that it was not palatable to have this application dismissed and have to wait until the next open period when it had done nothing wrong. The application of section 15 is not reserved for cases of collusion between a union and the employer, although they may be the cases that cry out most strongly for intervention. The fact that the applicant did not collude with the company is something we have taken into account. Nonetheless, the actions of the company have in our view lent such support to the CLAC campaign that we are of the view that section 15 applies. The result is one mandated by the Act in such circumstances; it is not a penalty to CLAC. It is one of the ways the statute attempts to preserve the right of employees to freely choose their own bargaining representative.

65. In the circumstances, and further to section 15 of the Act, the Board is unable to certify the applicant, and the application for certification is dismissed.

66. Given the above conclusions, it is not necessary to decide the effect of the role of the working foremen in the organizing campaign, and whether that alone, or together with the employer's activity, would have caused the Board to dismiss the application or hold a new vote. We are not of the view that it would be of any significant assistance to the parties for the future either, because the circumstances of any new application by CLAC would have to be judged afresh. Suffice it to note that organizing through working foremen in a certification campaign will always bear the risks of garnering support which is the result of alleged or actual undue influence, rather than the clearly voluntary wishes of the employees supervised.

67. There remains the matter of the complaints of unfair labour practice relating to interfering with the administration of Local 47 and intimidatory conduct. We note the fact that the unfair labour practice complaints filed by Local 47 were in response to CLAC's certification application, and were specifically aimed at findings related to the membership evidence collected and the vote that was held

in that application. In the circumstances of the dismissal of the application for certification, and in the exercise of our discretion, we decline to inquire further into those complaints. Neutrality must be the watchword for an employer in circumstances such as those before the Board; the employees are to be allowed their own free choice in matters related to the choice of the bargaining agent. We are of the view that the decision on the section 15 issue is sufficient to reinforce those basic principles, and that a decision on the other matters is not necessary in the result.

2181-92-M Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters & Joiners of America, Applicant v. **Duntri Construction Ltd.**, Responding Party v. Labourers' International Union of North America, Ontario Provincial District Council; The Metropolitan Toronto Sewer and Watermain Contractors Association, Intervenor

Construction Industry - Sector Determination - Board determining that construction of raw sewage pumping station falling within sewer and watermain sector and not ICI sector of construction industry

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

APPEARANCES: *David A. McKee* and *Michael Yorke* for Carpenters Local 27; *Carl W. Peterson* for Duntri; *John Moszynski* for Labourers; *Richard Charney* and *Sam Morra* for Metro Toronto Sewer and Watermain Contractors Association.

DECISION OF THE BOARD; June 5, 1996

1. This is a sector determination.
2. This matter was heard by the Board on May 1, 2, 31, June 14, 15, September 29, October 3, 1995 and January 19 and 31, 1996.
3. The work which is the subject matter of this sector determination involves the construction of a raw sewage pumping station, adjacent part of sanitary forcemain and sanitary sewer, inlet work modifications at a sewage treatment plant, and modifications at the River Street Pumping Station in the Town of Bracebridge. Although the modification work at the sewage treatment plant and River Street Pumping Station form part of the single contract let by the District Municipality of Muskoka, these items were relatively minor in a project worth approximately two million dollars. They did not form the bulk of the work undertaken and are not determinative of this sector determination. The essence of this sector determination revolves around the construction of the raw sewage pumping station known as the Brookfield Sewage Pumping Station in the Town of Bracebridge.
4. At this stage it is useful to set out the evidentiary ruling made by the Board at the commencement of the hearing as it provides some context to the case and indicates both what the sector determination *does* involve and what it *does not*.
5. On May 31, 1995 the Board rendered the following unanimous oral ruling:

"We have considered the submissions of the parties with respect to the evidence which the Board should properly admit as relevant to our determination of this application made pursuant to section 153 of the Act [as it then was].

Counsel for the Labourers, Duntri and Metropolitan Toronto Sewer and Watermain Contractors Association urged the Board to limit the evidence to “stand-alone” pumping stations, and not admit evidence with respect to pumping stations that were part of, or operated in connection with, water or sewer treatment facilities or reservoirs. Counsel for the Carpenters, while acknowledging that the work which forms the subject matter of this sector determination is a “stand-alone” pumping station, argued evidence of other pumping stations are relevant to counter or refute the assertions that the Brookfield Pumping Station is integral to the sewer and watermain system. One of the positions of the Carpenters is that this pumping station, if integral to something, is integral not only to the sewer and watermain work, but also to the sewer and water treatment facilities. Similarly, counsel for the Carpenters asserts that there has not been a decision with respect to the sector in which pumping stations fall. It may therefore be relevant to rely upon the fact that this pumping station is more like, or clearly different from, “something” which is clearly ICI (i.e. a pumping station at a reservoir or water or sewer treatment facility) than “something” which is clearly sewers and watermain work (i.e. pre-cast pipe laid underground). In this regard, counsel notes also that this pumping station is certainly quite unlike the pre-cast manhole with a submersible pump to which the Labourers, Duntri and the Metropolitan Toronto and Watermain Contractors Association have drawn an analogy in their respective Briefs. Just as it may be necessary to hear evidence which points to the difference and/or similarities between this pumping station and such pre-cast manholes with submersible pumps, it is also necessary to hear evidence which points to the differences and/or similarities between the Brookfield Pumping Station and pumping stations built in connection with water or sewage treatment facilities or reservoirs.

In our view, this sector determination involves a particular type of work and a particular type of situation which exists in a particular type of environment. Although in theory an analogy could probably be drawn between the Brookfield Pumping Station and any number of other structures or stations, and differences or similarities could be raised by either party, the purpose of a sector determination would not be served if this type of evidence, which at best will have only a very marginal, arguable relevance were admitted without regard to the fact that admission of such evidence would protract and lengthen these proceedings. We therefore propose to limit the evidence to work or structures which are substantially similar to the Brookfield Pumping Station. In our view, pumping stations which operate within and as an integral part of a sewage or water treatment facility, or as an integral part of a reservoir or storage tank system are *not* substantially similar to the pumping station which is at the core of this sector determination. Neither, however, are pre-cast manholes with submersible pumps. We therefore find that evidence relating to these types of “pumping stations” are also not relevant to this proceeding”.

6. Thus it can be seen that the work which forms the subject matter of this dispute is a *stand-alone pumping station* - *not* a pumping station built in connection with or adjacent to a water or sewage treatment facility or reservoir, and *not* a “pumping station” or pumping system which is little more than a submersible pump in a pre-cast manhole.

7. The parties to this sector determination joined issue as to whether the Brookfield Sewage Pumping Station fell within the ICI sector or the sewer and watermain sector. There was, however, little dispute amongst the parties regarding the applicable jurisprudence. Indeed, the parties each relied on many of the same cases. Chief amongst these were *The Heavy Construction Association of Toronto*, [1973] OLRB Rep. May 245, *West York Construction Limited*, [1983] OLRB Rep. Dec. 2132, *Sword Contracting Limited*, [1985] OLRB Rep. May 743, *Steen Contractors Limited*, [1989] OLRB Rep. Nov. 1173, *Dufferin Construction Company*, unreported decision, August 31, 1992, and *Matthews Contracting Inc.*, [1993] OLRB Rep. Dec. 1332, application for judicial review dismissed March 2, 1995.

8. Having reviewed that jurisprudence and the submissions of the parties, we find the following principles to be applicable to the case before us: In a sector determination where the issue is whether particular work falls within the ICI sector or the sewer and watermain sector, the primary focus is the end use of the construction work in issue. Where an end-use analysis is determinative of the sector, it is unnecessary to inquire further. Where an end-use analysis is *not* determinative, it is necessary to

inquire further and examine “work characteristics” to determine into which of the seven sectors of the construction industry the work in issue falls.

9. This proposition was first enunciated in the very first reported sector determination rendered in *The Heavy Construction Association of Toronto, supra*, where the Board stated:

10. We must thus turn to an examination of the meaning of section 106(e) [now 119] of the Act which defines the term sector. An examination of that definition indicates that it contains three components. The first component is that sector is a division of the construction industry. The term construction industry is defined in the *Labour Relations Act* in section 1(1)(f) [now 1(1)] which reads as follows:

1.-(1)(f) “construction industry” means the business that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.

Although certain terms appearing in the definition of construction industry also appear in clause (e) of section 106, the relationship between these two definitions is not sufficient to afford any assistance in interpreting the meaning of the term sector.

11. The second component of the definition in clause (e) of section 106 sets out the method by which divisions of the construction industry are to be determined. Thus, the divisions of the construction industry which constitute sectors are to be “determined by work characteristics”. On the other hand the expression “work characteristics” is one which is open to a variety of meanings and the problem of interpreting this section is largely one of ascribing the correct meaning to this expression.

12. The third and remaining component of the definition of sector is the enumeration of seven sectors of the construction industry which are included as meanings of the term sector of the construction industry. These, in turn, raise the additional problem of ascribing the correct meaning to each of the individual sectors so enumerated.

13. Although the definition of sector can be broken down into these three component parts, clearly the starting point in interpreting the statutory language used in the definition is the observation that they constitute one definition in the Act. Thus, it is clear that when the legislature enumerated the specific sectors set out in the definition it must be taken to have applied the test set out in that section when enumerating the sectors named therein. That is to say the enumerated sectors are divisions of the construction industry determined by work characteristics. Thus, the enumerated sectors give us a key to interpreting the expression “work characteristics” and in turn once the expression work characteristics is clarified this will provide assistance in the correct interpretation of each of the enumerated sectors.

14. An examination of the enumerated sectors in clause (e) of section 106 leads to the conclusion that *for all but one of the sectors listed the names given to these divisions of the construction industry relate to the use which is ultimately made of the construction*. At first this may appear to be somewhat of a puzzle in that the connection between the use of the construction and the work characteristics may not be obvious. Upon examination, however, it becomes clear that *the use that is ultimately made of the construction will to a large extent determine the task or the work to be performed at the construction site*. The task in turn will have certain characteristics which make that project distinguishable from other types of construction. Thus, each of the sectors enumerated, *by focusing on the different end uses of the construction*, distinguishes one type of construction from other types of construction on the basis of peculiar tasks which are common to that type of project. The work characteristics which distinguish one sector from the other sectors of the construction industry may be shown in terms of the type of problems to be dealt with at the job site, the types of solutions resorted to at certain job sites, the material used, the relative importance of various specifications, the variety of skills and trades, and certain characteristic relations with employees. This list of characteristics is not to be thought of as exhaustive, but as examples of particular characteristics which differ between the various sectors enumerated in the Act.

15. Having given a meaning to the test for determining sectors on the basis of work characteristics we can now turn to use this meaning as a tool for obtaining the criteria which separate one sector from another sector of the construction industry. However, as noted above there is one sector which unlike the other sectors enumerated in the Act does not refer to the end use made of the construction in that sector. This is the heavy engineering sector, which is the subject matter of this application. The name of this sector comes from the view that the division of the construction industry with which it is concerned has distinct peculiarities. As the name implies the problems faced in such construction projects are primarily engineering problems as distinct from design or architectural problems. Thus, for instance, these are projects in which it is more important that they serve their intended function rather than be attractive. The other characteristic of construction in this sector is that it involves the use of "heavy equipment". That is equipment which is capable of lifting, for example, heavy steel or concrete beams or equipment that is capable of moving huge amounts of earth, stone or concrete. Perhaps the classic example of a heavy engineering project is the construction of a large bridge.

[emphasis added]

In the vast majority of sector determinations rendered by the Board since 1973, an analysis which focuses first on the end use of the work in issue and thereafter on the work characteristics has been employed.

10. In this sector determination, after reviewing all of the *viva voce* and documentary evidence, we have concluded that an end-use analysis *is* determinative of the question to be answered in this sector determination as to whether construction of the Brookfield Sewage Pumping Station falls within the industrial, commercial and institutional sector of the construction industry or the sewers and watermain sector of the construction industry. We have therefore found it unnecessary to consider whether the work characteristics of this project point more to the ICI or sewers and watermain sectors of the construction industry. Accordingly, our abbreviated summary of the facts will focus on the end-use analysis and not the work characteristics of the project.

11. We note at the outset that the parties filed extensive written Briefs and documentary evidence with the Board. In addition, the parties agreed upon certain facts thereby obviating the necessity of calling much evidence (particularly as it related to other similar work performed by other contractors pursuant to either the terms of the Carpenters' or Labourers' provincial ICI collective agreements, or the Labourers' civil engineering agreement). Given our view on the matter of the "end-use" of the Brookfield Pumping Station had this evidence not been agreed upon, the calling of such evidence, ultimately would only have unnecessarily prolonged the hearing of this matter.

12. The District Municipality of Muskoka determined to construct a trunk sewer to service future development in the western portion of the Town of Bracebridge. To do this, the Municipality let two contracts out for tender at approximately the same time. The first contract covered the installation of sanitary forcemain, sanitary sewer and watermain which serviced the proposed new development area. This contract was ultimately let to Targa Limited and does not form part of this sector determination. The second contract was for the construction of the Brookfield Pumping Station. This contract was let to Duntri. Duntri performed the work using members of the Labourers' union and pursuant to its non-ICI agreement, with that union as it was of the view that the work fell within the sewer and watermain sector. It is this work which forms the subject matter of this sector determination.

13. At the time the District Municipality of Muskoka first considered its need to service future development in the western portion of the Town of Bracebridge, the Town of Bracebridge had an existing water pollution control plant ("sewage treatment plant"). As a result of a report prepared by Totten Sims Hubicki Associates, Engineers, the District Municipality of Muskoka considered several alternatives. One of these alternatives was to construct a new pumping station at the southern end of the service area which was to be serviced by the new trunk sewer. This pumping station would pump

the sewage collected in the new lines to the existing sewage treatment plant. Another alternative was to construct a new sewage treatment plant at which the additional sewage flow from the newly serviced area would be treated. Although we did not hear any evidence from the decision-makers at the District Municipality of Muskoka, based on the content of the report by Totten Sims Hubicki it is reasonable to conclude that for reasons relating to cost and the environmental approval process, the Municipality opted to construct a new pumping station which would pump the additional sewage flow from the newly serviced area to the *existing* sewage treatment plant. In the result, the sewage collected in the new sewer lines would be treated at the existing sewage treatment plant (in the same manner as the sewage collected from other existing sewer lines and pumping stations throughout the Town of Bracebridge).

14. The need for a pumping station was the result of the topography of the area. The existing sewage treatment plant and lagoons were located on the south side of the Muskoka River. The sewage treatment plant and lagoons are located at a ground elevation of approximately 238 metres. The invert elevation of the new sewer line was approximately eight metres lower and was on the other side of the Muskoka River. In order to move the sewage along to the lagoons and treatment plant, therefore, it was necessary to construct the pumping station (in the evidence sometimes referred to as a “lift station”) to pump the sewage from the lower to a higher elevation and on to the sewage treatment plant.

15. It is useful at this stage to briefly refer to the evidence of the witnesses as it relates generally to sewage systems and sewage treatment facilities. It is undisputed that a sewage system may rely upon gravity to transport sewage collected from one point (i.e. a residential or industrial development complex) to another point (i.e. a treatment facility or another sewage system). Unless the topography is such that there is a large drop in elevation, gravity and the natural slope of land however, will generally only transport the sewage so far. It was not disputed that at some point gravity ceases to be an economical method of continuing to move the sewage along to its intended destination as the depth of the system simply becomes too great. Thus, if the distance between the point of origin of the sewage and the point of destination for that sewage (i.e. the treatment plant) is too great, or if the topography is hilly, it may become necessary to have pumps or pumping stations installed in order to keep the sewage moving to its intended destination. In addition, pumps or pumping stations are generally installed at the sewage treatment plant itself in order to, inter alia, control the flow of sewage to be treated or to lift the sewage into the plant for treatment or processing.

16. The Brookfield Pumping Station is a three-level structure. Two levels are underground. The third level is a superstructure or building aboveground which, from outward appearances, looks much like a house. The top level of this structure houses a diesel generator which operates the pumps underground, a fuel storage area and a washroom and work area for persons working in the facility.

17. The belowground portion of the Brookfield Pumping Station is essentially a large, formed in place, reinforced concrete box with an inlet channel through which sewage from the adjacent sewage line is drawn. Sewage drawn into the pumping station flows through a bar rack or inlet grate to a lower chamber called the wet well. From there, pumps push the sewage up along to forcemains and then pump the sewage through the forcemain back into the sewer system and on to the sewage treatment plant.

18. What then is the function or end use of the Brookfield Pumping Station? Counsel for the Carpenters asserts that this pumping station is not a sewer and watermain project as is evident inter alia from the fact that it is not a large or small pipe carrying sewer or rain-water. The work involved certainly did not consist primarily of trench excavation and the laying of pre-cast concrete sewer pipes - work which one would normally associate with a sewer and watermain project.

19. Counsel for the Carpenters asserts that the pumping station does not merely enhance the flow of sewage. Rather, the function of the pumping station is to control the movement of sewage as part of a treatment process. The sewage is moved, put under pressure and pumped out to a sewage treatment plant for processing. The control of the movement of the sewage is part of that processing function. In addition, the bar rack or inlet grate in the pumping station itself performs a processing function insofar as it screens large items and grit.

20. Counsel for the Carpenters also referred to various factors which, although they related primarily to the issue of “work characteristics” (broadly defined) could also be indicative of the processing-type functions carried on at the pumping station. Thus, for example, the superstructure aboveground is more likely to be associated with a processing function. The equipment in the pumping station (including the pumps themselves) and the mechanical and electrical components of the project (both in terms of the kind of equipment and the extent of the equipment present) are also more likely to be associated with a processing function.

21. We are unable to accept counsel’s characterization of the function or end use of the pumping station. The evidence discloses that the pumping station does not treat or process the sewage in any fashion, but merely moves it along from its point of origin to its point of destination. Sewage which enters the pumping station is not processed or even held for settling purposes at the pumping station. It is simply moved along and is no more an adjunct of the treatment process than the sewer pipes which carry the sewage.

22. Although it is true that sewage is measured both as it goes into, and exits from, the pumping station, the measuring which occurs is simply a measuring of flow. It merely enables the treatment facility which ultimately processes the raw sewage to determine the capacity of that which will subsequently be processed. The pumping station does not increase the capacity of the sewage.

23. The bar rack or inlet screening also does not process, treat or “settle” the sewage. Its purpose is to protect the pumps from becoming plugged and to prevent large items from entering the pumps. The bar rack or inlet screen is merely a series of parallel bars with spacing of approximately one inch. Unlike a sewage treatment plant or lagoon, the bar rack or inlet screen does not perform a “settling” type function, as was the case of the water storage tank in *Matthews Contracting, supra*.

24. Sewage treatment plants, lagoons and even the water storage tank in *Matthews Contracting* all affect the material stored or treated and in this way can be said to be part of the “processing” of the material. Thus for example, lagoons and the underground water storage tank improve the quality of material held through a “settling” function. The Brookfield Pumping Station does none of these things. It simply assists in the carriage or transport of sewage from point of origin to point of destination at a time when gravity and topography render it inefficient or impossible for the sewage to continue flowing through sewage pipes. Indeed, the pumping station’s function is quite the opposite to settling. Rather than permitting the sewage to settle, its function is to continue to move it along the sewage lines to the treatment or “processing” facility. The functions of settling, disinfecting, aeration, etc., which one would normally associate with the processing of raw sewage do not take place at the Brookfield Pumping Station and are not affected by that station. The sewage which entered the pumping station untreated, leaves the pumping station, in the same untreated form.

25. In *Matthews Contracting, supra*, the Board referred to work which may exist at the “juncture of two sectors”. In our view, that is the difficulty with the case of *this* pumping station which is physically separate from the treatment or processing facility and yet which is not something which one would readily or easily identify as a sewage (as opposed to a *sewage treatment*) system. On balance, however, we have concluded that, although close to the dividing line between a “processing” facility (which would normally be considered to be in the ICI sector), and work such as sewer “line” work

(which is typically considered in the sewer and watermain sectors), ultimately the *end use* of this pumping station falls within the sewer and watermain sector.

0352-96-R; 0580-96-G Robert Scafe, Applicant v. Labourers' International Union of North America, Local 1059, Responding Party v. Gavigan Contracting Ltd., Intervenor; Labourers' International Union of North America, Local 1059, Applicant v. **Gavigan Contracting Ltd.**, Responding Party

Bargaining Unit - Construction Industry - Employee - Grievance - Termination - Board ruling that non-ICI collective agreement between employer and Labourers' union not covering work performed in the "yard" on the termination application date - Accordingly, Board determining that no one working in bargaining unit on application date - Termination application dismissed

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

APPEARANCES: *John H. McNair* and *Robert Scafe* for the applicant; *Carolyn Hart* and *Walter Medeiros* for the responding party; *Joel Levesque* and *Mark Gavigan* for the intervenor.

DECISION OF THE BOARD; June 20, 1996

1. Board File No. 0352-96-R is an application for termination of bargaining rights in the construction industry. Board File Nos. 0580-96-G and 0581-96-G are Referrals of Grievance to Arbitration under section 133, Construction Industry.

2. After hearing the submissions of the parties the Board ruled the collective agreement did not cover the work performed in the yard on the application date. Therefore there was no one at work in the bargaining unit on the application date. The following are the Board's reasons for this bottom line decision.

3. The section 133 grievances allege Mr. R. Scafe was hired contrary to the ICI collective agreement and the non-ICI agreement. Mr. Scafe is the applicant in the termination application pursuant to section 63(2)(a) of the Act. At the hearing all parties agreed the termination application is with respect to the bargaining unit covered by the non-ICI collective agreement effective May 1, 1994 to April 30, 1996 between Gavigan Contracting Ltd. and Labourers' International Union of North America, Local 1059.

4. The description of the bargaining unit set out in paragraph 4 of the termination application states:

"Construction labourers engaged on all construction projects within the counties of Middlesex, Bruce, Elgin, Oxford, Perth and Huron, save and except non-working foremen and persons above the rank of non-working foremen, office and clerical staff and engineering staff."

5. Section 63(2)(a) of the Act provides:

63.(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 67, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

6. It is common ground between the parties that:

- i) Gavigan's work is primarily in the non-ICI sectors of the construction industry, approximately 90%;
- ii) that on the termination application date Mr. Scafe did work part of the day on an ICI project - MacDonald's Restaurant; and
- iii) the majority of the time was spent doing work in the employer's yard at 2093 Jetstream Road.

7. The work performed by Mr. Scafe at the yard for the applicant is described by counsel as follows:

- . The rebanding of left-over bundles of paving stones.
- . The moving of materials around the yard, both concrete blocks and paving stones to allow access to other materials to be used for the building season.
- . Straightening up piles of stone.
- . Sorting piles of concrete forms - decide which forms to discard and which forms to clean and reuse for the coming building season.

8. The above work is stipulated by the parties as the work performed in the yard with the exception of the cleaning of the forms. For the purposes of the preliminary issue of whether the non-ICI agreement relates to the work performed by Mr. Scafe on the application date, the Board accepts the assertion that cleaning of forms was done by Mr. Scafe. We further note that counsel for Labourers' Local 1059 did not agree that cleaning of forms was done in the yard on the application date. It is not necessary in light of the union's position that this collective agreement does not cover any shop work or yard work or work performed at the employer's premises, to resolve that issue.

9. There were a number of issues with respect to the termination application. The respondent union asserts there was no one at work in the bargaining unit because the collective agreement does not cover the work performed on the application date. The union further asserts the applicant, Mr. Scafe, was working in violation of the collective agreement. The employer had failed to call the hiring hall requesting Mr. Scafe and therefore no referral slip had been issued as required by the collective agreement. It was agreed that Mr. Scafe was entitled to be recalled under the non-ICI collective agreement and, but for the lack of referral slip, was properly at work on any non-ICI projects. No other person was denied their turn on the list under the non-ICI agreement. Labourers' Local 1059 asserts the principle established in April Waterproofing applies to the present situation, i.e. Mr. Scafe was hired contrary to the terms of the applicable collective agreement and therefore is not eligible to vote in this application for termination of bargaining rights.

10. The relevant articles of the collective agreement are set out below:

ARTICLE 1 - RECOGNITION

1.01 The Company recognizes the Union as the sole collective bargaining agency for all its construction labourers engaged on all construction projects within the Counties of Middlesex,

Bruce, Elgin, Oxford, Perth and Huron, save and except non-working foremen and persons above the rank of non-working foremen, office and clerical staff and engineering staff.

• • •

ARTICLE 3 - UNION SECURITY

• • •

3.05 The Company agrees to call the Local Union for its supply of men. All employees hired through the Union shall present to the employer a referral slip from the Union prior to commencing employment. It is understood that if the Local Union is unable to provide the required men within 24 hours, the Company is free to hire such labour as is available, but such labour shall acquire a referral slip prior to commencing work, and as a condition of employment, shall become a member in good standing in the Union within fourteen (14) days.

3.06 In recognition of the Company's need for competent and capable employees, the Union agrees that the Company has the right to call the Union office and request any unemployed Union member. Therefore, the Union recognizes the Company's right to recall their regular employees after a seasonal lay-off. The Union also agrees that it shall issue referral slips.

• • •

ARTICLE 8 - JURISDICTION

• • •

Working foremen and Labourers required for cleaning, washing and painting of Company equipment and barricades, etc. used in Company's shop

• • •

The Company agrees to give Union members the first opportunity to perform work in the shop, snow removal, snow plowing and sanding if they're capable of performing such work from December 1 to May 1 of each year. Articles 3.03, 14 and 22 shall not be applicable for that period.

• • •

11. The applicant and the intervenor (in the termination application) took the position that the collective agreement applied to the work performed in the yard on the application date. Counsel for the applicant asserts the yard work performed on April 29, 1996 (the application date) was directly related to and ancillary to the work of labourers on construction projects and thereby caught by the recognition clause of the collective agreement. But even if this is not the case it is swept in by article 8. As the overwhelming preponderance of the company's work is in the non-ICI sector the materials on April 29, 1996 were intended for use and have been applied towards non-ICI construction projects that have been and will be undertaken by Gavigan. Counsel for the applicant in the termination application submits there is by virtue of the organizing and clean up of this material a physical nexus between the work going on offsite and the actual construction projects undertaken by the company. This same work when done by Mr. Scafe on a construction site is labourers' work covered by the collective agreement. Mr. Scafe is a construction labourer because he is commonly associated in his work because of his physical connection and association with the construction labourers on site. Counsel submits this form of yard work should be considered part of the bargaining unit work. The work done in the yard facilitates the use of those materials on the construction projects.

12. Counsel points out that neither the union, Mr. Scafe or the company have distinguished the yard work for any purpose including payment of dues, benefits etc. There is an administrative difficulty in distinguishing between work done in the yard and on site especially if the work is done by the same

persons. Counsel referred to the last part of article 8 stating the words “work in the shop” must be different than the reference to work done in the paragraph above. The last sentence, “Articles 3.03, 14 and 22 shall not be applicable for that period”, must be read to mean for that particular work. It cannot mean there is a five months’ moratorium for all work.

13. Counsel for the company adopts the submissions of the applicant. Mr. Scafe was performing construction labourer work in the yard. The majority of the company’s work is non-ICI construction work. The intervenor submits it would be impractical not to classify that work as work within the bargaining unit. It does not make any practical sense for labour relations purposes to hive off construction labourers’ hours worked depending how some of the provisions of the collective agreement should be applied to those hours. It makes good sense to interpret the collective agreement to cover yard work. Counsel expressed a concern that if the collective agreement does not include the work performed on the application date the bargaining unit members may not be able to exercise their rights as there may be no one at work in the bargaining unit during the open period.

14. Counsel for the respondent union submits its a stretch to interpret the language in the collective agreement to cover the work in issue. Counsel asserts article 1 of the agreement clearly refers to construction projects. There is no ambiguity in the language of the collective agreement. Section 63(2) refers to any employee in the bargaining unit. There is no need to hear extrinsic evidence, the agreement is clear on its face. Article 8 reinforces article 1. Union members are to be given first opportunity to perform work in the shop, snow removal, snow plowing and sanding if they are capable of performing such work from December 1 to May 1 of each year. Because the employer has chosen to apply the collective agreement to work not covered by the collective agreement it does not mean the collective agreement was intended to apply to the work in the shop.

15. The case cited by the applicant, *DuraSystems Barrier Inc.*, [1995] OLRB Rep. Jan. 14, refers to the ICI industry which does not assist in this case. Counsel asserts the applicant’s interpretation of the collective agreement is not reasonable. If it was the intention of the parties to include this work it could have been spelled out in the collective agreement.

Decision

16. After considering the parties’ submissions the Board found the work performed on the application date by Mr. Scafe, as described by counsel for the applicant, is not work covered by the non-ICI collective agreement. Article 1 of that collective agreement refers to construction projects. Reading the relevant articles of the collective agreement the Board is not persuaded that the clean-up work in the yard at the employer’s premises involves the kind of nexus contemplated by the Board’s jurisprudence in the ICI sector of the construction industry. Mr. Scafe was the only person who cast a ballot and his ballot was sealed pending the outcome of this hearing. Having found that, Mr. Scafe was not performing bargaining unit work on the application date, this application for termination of bargaining rights is dismissed.

17. The Registrar will destroy the ballot cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

18. This leaves the two grievances. The applicant union is directed to advise the Registrar how it wishes to proceed. This panel is seized with respect to those two grievances.

3485-95-U; 3486-95-U General Motors of Canada Limited, (“GM” or “the company”) Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), et al. (listed on “Schedule A” to the application), Responding Parties

Charter of Rights and Freedoms - Constitutional Law - Remedies - Strike - General Motors alleging that work stoppage at its London plant in connection with day of protest constituting unlawful strike and seeking declaratory relief as well as cease and desist direction - Union asserting that work stoppage was form of political expression protected by Charter and not “unlawful strike” - Board agreeing that work stoppage was form of “expression” protected by section 2(b) of the Charter, but holding that Labour Relations Act’s prohibition on strikes during currency of collective agreement part of balancing embodied in the Act that is within the realm of reasonableness that Courts have accorded to legislatures when addressing labour relations problems - Board finding impugned provisions of the Act not inconsistent with Charter - Board declaring work stoppage at London’s GM plant to be unlawful but declining to issue cease and desist direction in respect of future protest strikes

BEFORE: R. O. MacDowell, Chair.

APPEARANCES: W. Jason M. Hanson, David Stratas, Mathew Taylor, Elisabeth Campin, Rick Monteith and D. Lang for the applicant; L. N. Gottheil and Gary Wegman for the responding parties.

DECISION OF THE BOARD; June 7, 1996

WHAT THIS CASE IS ABOUT

1. These are applications under sections 96 and 100 of the *Labour Relations Act, 1995* (“the Act”) that were filed with the Board on December 22, 1995.

2. The company contends that on Monday, December 11, 1995, employees at the GM diesel plant in London, Ontario engaged in an unlawful strike. GM asserts that the strike was organized by the CAW and its officers in conjunction with the Ontario Federation of Labour (“OFL”), and further that union officers and members engaged in a variety of activities (including picketing at the workplace) which they knew would cause that unlawful strike. In the company’s submission, these actions contravene sections 79, 81 and 83 of the *Labour Relations Act*. They also violate the “no-strike” clause of GM’s collective agreement, which provides:

(5) Inasmuch as this Agreement provides orderly procedures for the settlement of employee grievances and for the handling of other matters, the parties hereto agree that *there shall be no strikes or lockouts during the life of this Agreement*. The words “strikes” and “lockouts” as used herein are agreed to have the meanings defined for these words in the Ontario *Labour Relations Act* for plants of the Company located in the Province of Ontario and in the Quebec Labour Code for plants of the Company located in the Province of Quebec.

(emphasis added)

3. The provisions of the *Labour Relations Act, 1995* upon which the company relies read, in part, as follows:

1. (1) In this Act,

[Strike definition]

“strike” includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

[Collective Agreements are binding and must contain a “no strike” clause]

56. A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

*

46. Every collective agreement shall be deemed to provide that there will be no strikes or lock-outs so long as the agreement continues to operate.

[No strikes during the term of a collective agreement; disputes must be submitted to arbitration]

79. (1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

• • •

(6) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

*

81. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

*

83. (1) No person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

*

48. (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

(2) If a collective agreement does not contain a provision that is mentioned in subsection (1), it shall be deemed to contain [a statutorily described arbitration clause]

4. For comparison purposes, the “lock-out” definition provides:

[Lock-out definition]

“lock-out” includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of employees, with a view to compel or induce the employees, or to aid another employer to compel or induce that employer’s employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers’ organization, the trade union, or the employees.

5. And the remedial provisions of sections 96 and 100 of the Act read this way (in part):

96. (4) ... where the Board is satisfied that an employer, employers’ organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers’ organization, trade union, council of trade unions, person or

employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

(a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;

(b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of;

*

100. Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike or that employees engaged in or threatened to engage in an unlawful strike or any person has done or is threatening to do an act that the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike, the Board may so declare and it may direct what action, if any, a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

6. The company submits that the "no strike" sections of the legislation have been in the Act for 50 years, and are part of a comprehensive scheme governing the acquisition, protection and exercise of collective bargaining rights. Within that framework, strikes are permitted only if a collective agreement has expired, if the compulsory conciliation process has been completed, and if the employees have authorized the strike by secret ballot vote. The company asserts that none of these conditions have been met in this case; moreover, in the company's submission, the union called the strike knowing that a work stoppage was unlawful and intending to disrupt the company's business.

7. The company points out that the work stoppage in London was only the first of a series of similar "protest strikes" in which the union has threatened to engage. Further strikes are planned for Hamilton and other Ontario cities, culminating in a threatened "general strike" that would cover the entire province. The company does not know when or where the new work stoppages will take place. But since GM has production facilities in Oshawa, Windsor, St. Catharines, Scarborough and Woodstock, there is a real likelihood that other GM plants will be hit.

8. In the company's submission, the union has announced a pattern of unlawful work stoppages that has already caused a shutdown in London, and will almost certainly affect other GM operations in other parts of Ontario. But the union has not approached the company to work out an arrangement so that workers could engage in "political protests" of this kind without breaching their collective agreement or interfering with production. On the contrary. The company submits that interfering with production is an integral part of the union's political "message", and is designed to penalize businesses that are thought to be in sympathy with the current government's policies. GM asserts that the union's actions are directed against the company itself, not just the government and its policies. GM is also a target.

9. GM submits that "politically motivated strikes" were found to be unlawful by the Board and the Courts twenty years ago in the *Domglas* case (see: *Domglas Ltd.*, [1976] OLRB Rep. Oct. 569; affirmed by the Divisional Court (1978) 19 O.R. (2d) 353) and that political strikes are still unlawful today. The law in respect of unlawful strikes has not been changed by the *Charter of Rights and Freedoms*, introduced in 1981. In the company's submission the *Charter of Rights and Freedoms* does

not relieve either the union or the employees of their statutory and contractual obligations. Nor does it allow them to stage a strike whenever they have some quarrel with a government policy.

10. GM urges the Board to make a “*declaration*” that unlawful strike activity has occurred. GM also urges the Board to issue a “*cease and desist direction*” to prevent its production facilities from being disrupted if future protest strikes are scheduled for the communities in which GM plants are located.

* * *

11. The union does not deny that on December 11, 1995 there was a “work stoppage” at the GM diesel plant in London. However, the union contends that this work stoppage was the action of a group of employees who were collectively concerned about the policies of the recently elected provincial government. The work stoppage at GM Diesel took place in conjunction with a parallel work stoppage by the employees of many other employers in the London area. The situation at GM diesel was part of a much broader *political* protest that took place in London that day.

12. The union contends that the December 11th work stoppage was a manifestation of widespread employee opposition to the legislative direction of the current provincial government and was designed to protest that direction in a graphic way. The union submits that, in the circumstances, the protest is not really an “unlawful strike” within the meaning of the *Labour Relations Act, 1995*. It was not “designed” to change the employees’ conditions or employment or to restrict or limit output; and in any event, GM’s actual production losses were minimal.

13. More fundamentally, though, the union contends that even if the work stoppage in London could be characterized as an “unlawful strike” (looking only at the *Labour Relations Act, 1995*), it is *also* a form of *political expression* that is now protected by the *Charter of Rights and Freedoms*. The work stoppage delivers a political message through a combination of speech and action, and, in the union’s submission, any attempt to limit such protest under the labour relations statute would collide with fundamental protections found in the *Charter*.

14. In the union’s submission, the *Charter* is now the supreme law of Canada, and overrides any restrictions that might be found in the *Labour Relations Act, 1995*. The union argues that the general law has changed since the *Domglas* decision in 1976. The *Charter* now protects all forms of expression, including political and economic expression, and that protection extends to “expressive conduct” of the kind involved in this case. The union refers to a number of provisions of the *Charter*, including the following:

1. The **Canadian Charter of Rights and Freedoms** guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

*

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In the union's submission, the comprehensive "no strike" prohibition infringes *Charter* guarantees, and is not "justifiable" under section 1 of the *Charter* (see above).

15. The union asserts that if GM had closed its plant for a day because of GM's unhappiness with the provincial government's policies, that too would be "expressive conduct". But, in the union's submission, it would not even be a "lockout", let alone an unlawful one under the *Labour Relations Act*, because it would not have the express collective bargaining purpose mentioned in the lockout definition. A "political lockout" would not be prohibited, so, in the union's submission, a one-day protest should be treated in a parallel fashion. The union demands equal treatment for strikes and lockouts.

16. Finally, the union contends that even if the work stoppage is an "unlawful strike", and even if it is not protected by the *Charter*, the Board, *as a matter of discretion*, should not issue a Declaration of unlawfulness or a "cease and desist" Direction. The union points out (*inter alia*) that the employer has a variety of other labour law remedies to rectify any commercial damage that it may have suffered, and in the union's submission, a Board Order is neither necessary nor sound labour relations policy.

17. In the union's submission, the one-day protest was not a typical "wildcat strike" designed to secure some collective bargaining advantage. It was a moderate and relatively confined collective expression of political concern. The union urges the Board to exercise its discretion "in accordance with *Charter* values" so as not to inhibit the ability of employees to collectively protest what they believe to be bad laws.

* * *

18. A hearing in this matter was conducted in Toronto, in mid-February 1996. The applicant and the respondents were represented by counsel and the Attorneys General of Ontario and Canada were both given notice of the hearing so that they could intervene in respect of the *Charter* question. However, no one appeared on behalf of the Crown to address those *Charter* issues.

19. Counsel for the parties agreed that most of the facts were not in dispute, and could be put before the Board by means of written statements that would not be subject to formal proof. However, it was understood that both counsel would be free to argue about the significance or proper characterization of those facts, as well as the inferences to be drawn from them. On the same basis, the Board received several volumes of documentary material (newspaper clippings, letters from the company to various union officials, union newsletters and bulletins, articles about the history of the labour movement and the UAW/CAW, material on political strikes in Canada, descriptions of the union's social and political activities, declarations about the links between the labour movement and other social action groups, etc.). Once again, this documentary material was received without formal proof and on the understanding that counsel could address its utility in the context of the case.

20. The statements produced by the parties coincided in a number of areas, but they had a very different focus, so that it is difficult to combine them into a single integrated narrative. The two statements will therefore be reproduced below in the form in which they were filed; and where they

make reference to other documents or material, those references will be incorporated into the statement or briefly summarized. The supplementary material will be summarized in a similar way.

EMPLOYER'S STATEMENT OF FACTS

1. The Applicant, General Motors of Canada Limited ("General Motors"), is party to an existing collective agreement (the "Master Agreement") with National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (the "National Union") and its Local, National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Local 27 ("Local 27") (collectively the "Union"). There are supplemental agreements applicable to each Local Union affiliate of the National Union at each General Motors location covered by the master agreement as follows: Local 27 - General Motors Diesel Division [London, Ontario]; Local 222 - Oshawa; Local 199 - St. Catharines, Ontario; Local 222 - Oshawa, Ontario; Local 303 - Scarborough, Ontario; Local 636 - Woodstock, Ontario; and Local 1973 - Windsor, Ontario. All of the events described in paragraphs 18-24, 32 and 33 occurred at the General Motors Diesel Division located at 2021 Oxford Street East, London, Ontario, N6A 4N5.
2. The employees of General Motors in the Union's bargaining unit are covered by a valid and subsisting collective agreement which has a no-strike/lockout clause. Unless stated otherwise, "employees" refers to employees at the General Motors Diesel Division in London in the Union's bargaining unit.
3. General Motors manufactures diesel locomotives and light armoured vehicles at its Diesel Division in London.
4. The Union has indicated to General Motors that they oppose **Bill 7** which amended the *Labour Relations Act*. In September, 1995, the Union requested General Motors that it write a letter with the Union to the Office of the Premier of Ontario asking that the government consult with the labour relations community and study the labour relations environment in Ontario closely before proceeding to make changes to the law so quickly. The attached joint letter written by the CAW and Chrysler Canada is an example [letter omitted]. General Motors declined that request. Attached is a list of companies which co-signed with the CAW similar letters [list omitted].
5. On or about October 2, 1995, the National Union President, Basil Hargrove, indicated that if any employer, and specifically Ford and General Motors did not sign letters directed to the Premier of Ontario protesting the proposed changes to the *Labour Relations Act* "we're going to go with an all-out frontal attack in the workplace." (Applicant's Supplementary Book of Documents, Tab 2)
6. On or about October 20, 1995, Mr. Hargrove made certain public statements [at a union meeting in St. Catharines] accurately recorded at Tab 1, Schedule D of the Application:

"I'm saying to the corporation [GM] you have a choice ... Just join with Mike Harris and say take away our rights and believe me, we're going to change harmony for anarchy in the workplace ... normal demonstrations won't work for the union this time ... the one weapon we have which we have never used as a collective is our power in the workplace".
7. By memo dated October 26, 1995, Mr. Hargrove advised the President of the Ontario Federation of Labour that the CAW supported "a province-wide" shutdown. (Applicant's Supplementary Book of Documents, Tab 3)
8. On or about October 31, 1995, Mr. Hargrove made certain public statements [at a meeting of CAW officials] accurately recorded at Tab 4, Schedule D:

"The corporations cannot continue to expect cooperation, make enormous profits and pay exorbitant executive salaries while the Harris government is

attacking the only democratic institution that workers have - their unions ... These corporations have to realize that Bill 7, which sets labour relations back 50 years, is going to mean uncertainty and at times, disruption”.

9. On or about November 13, 1995, the Ontario Federation of Labour and a number of trade unions, including the CAW National Union, announced their intention to counsel, procure, encourage and engage in massive work stoppages in an attempt to “shut down” the City of London on December 11, 1995 to protest the current provincial government’s agenda, including **Bill 7**. The Ontario Federation of Labour and the Union utilized the mass media to call and encourage the work stoppage on December 11, 1995.
10. On or about November 13, 1995, Mr. Tim Carrie, President of Local 27 [GM Diesel - London, Ontario], publicly stated that he was calling on his members to join in the December 11th protest instead of working on that day. The Union and the employees knew at all material times that December 11th was a work day and that production was scheduled for December 11th.
11. During the last two weeks in November and up to December 11th, the Union and their agents and officials instructed the workers not to work on December 11th and urged them to join the protest on December 11th. The Union distributed various documents to the workers (Applicant’s Document Book, Schedule D, tabs 21, 22 and 23; Responding Party’s Document Book, tabs 12 and 15):

[GM’s Tab 21 is a union invitation to the “Day of Protest” to show the Harris Government “that we are determined to fight back against the most vicious anti-worker government our Province has ever known”].

[GM’s Tab 22 is a CAW newspaper discussing the upcoming day of protest. The newspaper quotes the CAW President’s speech at the fall 1995 OFL convention where he explains the need to protest against “the anti-worker corporate agenda of Premier Mike Harris ...”. Various CAW officials are quoted, including staff representative Ron Pellerin who observes that the business community supports cut-backs, and Rick Witherspoon (President of CAW Local 1520 and the London and District Labour Council) who observes (*inter alia*) “We will make London the start of the militant and ongoing fight back against this government ... it’s time Harris and his supporters in the business community taste the insecurity workers face. Labour’s fight against the Tory agenda must continue for the whole term Harris is in government”]

[GM’s Tab 23 is a schedule of meeting times and places for the December 11th protest, inviting individuals “to come out in solidarity in support of each other and your community”].

[Union’s Tab 12 is a document co-signed by Rich Witherspoon inviting participants in the December 11th protest to “send an unmistakable message to the Harris Government”, and providing parking, marshaling, and march information].

[Union’s Tab 15 consists of CAW newsletters dated October 17, 1995 and November 16, 1995 and entitled “A Line in the Sand”. These publications review the union’s position on Bill 40 passed by the NDP government in 1992 and repealed by the current government in November 1995. The union contests the alleged faults of Bill 40, and its alleged anti-business impact. The piece also protests the proposals contained in Bill 7 (“Corporate Ontario wants to turn the clock back ... the reality is employers never had it so good ...”). The November 16th “Line in the Sand” newsletter contains a critique of the content of Bill 7 (a “pro-business revision of the Ontario labour law”) and the fact that it was passed quickly and without public hearings. The article further notes the government’s intention to repeal the “Employment Equity” legislation passed by the NDP government].

12. The unions encouraged and arranged that union members from areas outside of London, such as Toronto, Windsor, Kitchen, Waterloo, etc. come to London and participate in the day of protest.
13. On or about December 4, 1995, a letter dated December 1, 1995, signed by W. J. Kienapple, Executive Director, Diesel Division, General Motors, was mailed to the home address of each and every hourly employee of General Motors, Diesel Division. (Tab 10, Schedule D).

[The letter warns employees that the proposed work stoppage constitutes an illegal strike which is contrary to the law and the terms of the collective agreement; and urges employees to reconsider their participation in that work stoppage and abide by the law].

14. On or about December 5, 1995, a letter dated December 5, 1995, signed by D. W. Munger, Vice President and General Director of Personnel, General Motors, was forwarded by fax and by mail to Mr. Hargrove [President of the CAW]. A copy of this letter is attached at Tab 11 of Schedule D.

[This letter asserts that the proposed work stoppage is unlawful under the *Labour Relations Act* and is contrary to collective agreements binding the employee members of CAW Local 27. It urges President Hargrove to use his influence to avoid a work stoppage].

15. On or about December 5, 1995, a letter dated that same date, copy attached, was hand delivered to Gary Wegman, Chairperson, CAW Local 27. (Tab 12, Schedule D).

[This letter is similar in content to the one sent to CAW President Hargrove].

16. The Applicant received no response from either the National or the Local Union in respect of the letters referred to in paragraphs 14 and 15 above, and neither the National nor the Local Union did anything to encourage employees to work on December 11th - instead, the National and the Local Union continued to urge employees not work on December 11th. On or about December 7, 1995, Mr. Hargrove publicly stated:

I'm just furious that the corporate elite somehow think they have the right to dictate that our workers can't protest unjust laws. They'll have to deal with us the next day. We're not going to be intimidated about threats and the pursuit of damages. I've urged my members to ignore the letters.

(Applicant's Supplementary Book of Documents, Tab 1)

17. On or about December 7, 1995, Mr. Hargrove told the employees directly and publicly stated that the employees should ignore the warnings of the Applicant.
18. The protest schedule (Applicant's Schedule D, Tab 23) was distributed amongst Union agents and officials. Some copies found their way to the shop at the London Diesel Plant on December 8, 1995. In general, the membership was encouraged to attend the rally and march set to start at approximately 9:30 a.m. Accuride is a facility in London where the CAW Local has an existing collective agreement. The plan of the Union and others involved in organizing the day of protest was that picket line demonstrations were to be established at various employers in the London area, including the General Motors Diesel Plant. As a general rule, the picket line demonstration was not to be composed of employees from the location being picketed.
19. At approximately 7:15 p.m. on Sunday, December 10th, a picket line was established by the members of the National Union at the entrances to the General Motors Diesel Plant. Mr. Hargrove was present at the picket line for approximately 15 - 20 minutes and an active participant of it. Mr. Hargrove gave a live television interview from the picket line at 11:00 p.m. on Sunday, December 10th, which is transcribed at the Applicant's Supplementary Book of Documents, Tab 4.

(in part):

"We've closed down General Motors tonight and also Ford is down. Accuride is down, Foam Rite, a host of plants have been downed [applause]. And this is just the start this evening, it's going to be more tomorrow that is going to get down. This is a show of concern, that the people, members of our union, I think the broader general public understand that 82 people who get elected don't have the right to dictate to the rest of the province. We do live in a democracy and people have a right to be consulted. If you're going to take away so much from so many, surely they are obligated to hold public hearings and committees' hearings and let people have input. You can't have this kind of anti-democratic attitude and not expect this kind of fight back ... No, no, we've always said it's a day of protest, which means we're gonna shut down the City of London and then a few weeks from now we are going to select another city in the province and we're gonna shut it down, and we're gonna work with our social partners and all of those who are concerned about this massive transfer of wealth by this government, to the wealthiest group from people from the lowest income groups in our society.

20. There was a work stoppage on December 11, 1995. Three production shifts were scheduled on December 11, 1995. The first of these was to begin reporting for work at approximately 11:00 o'clock p.m. on Sunday, December 10. The hourly workforce attending work, by shift, was as follows:

Shift	Scheduled	Reported
Third (Sunday, Dec. 10, 1995 11 p.m.)	280	9
First	1276	25
Second	548	23

21. Typically, non-scheduled absenteeism is 8.6%. For the three December 11, 1995 shifts, virtually no bargaining unit employees reported for work. 980 hourly employees phoned in to say they would not be reporting for work. 706 indicated "personal reasons" while 274 claimed to be sick. As a result there was no production of the Diesel Division during these shifts. A detailed analysis of exact shift start times and the number of hourly employees scheduled has been filed.
22. The picket lines dispersed after scheduled shift change times had past and reassembled as the time for the next shift change approached. This pattern continued throughout the day. Many of the picket signs contained the CAW logo and some picketers carried CAW flags. Many picket signs had a slogan on them as well as "Line in the Sand". Further, the picket signs contained various anti-Tory and anti-Harris slogans or messages. Some hourly employees, when they saw the picket line, drove away from the plant and did not report for work.
23. On December 11, 1995, all stationary engineers scheduled to work in the "power house" reported to work. These employees had been issued letters by the Union allowing them to pass through or to cross the picket line.
24. On December 11, of the approximately 640 salaried non-unionized personnel scheduled to work, nearly 100% reported for work.
25. Other London employers were picketed. For example, starting at 10:00 p.m. on December 10, 1995, a picket line was formed at the entrances to Accuride Canada Inc. Some picketers at Accuride were GM Diesel employees.
26. Subsequent to December 11, 1995, several leaders of the Trade Union movement, including Mr. Hargrove have said there will be other protests in other Ontario cities. Mr. Hargrove stated on December 13, 1995: "It's a matter of where and when."

27. General Motors has production facilities in a number of Ontario cities, including Oshawa, Windsor, Woodstock, Scarborough and St. Catharines.
28. On or about December 7, 1995, Claude Denoncourt, Regional Personnel Director, General Motors of Canada Limited, forwarded to Mr. J. Kovacs, President, C.A.W., Local 222 (Oshawa) and Mr. D. Whale, Chairperson, a letter, copy attached. (Tab 14, Schedule D).

[The letter expresses concern over Oshawa Local 222's support for the December 11th work stoppage, and urges the leaders of the Oshawa Local to take steps to avoid any similar disruption of the GM facility in Oshawa].

29. On or about December 8, 1995, Mr. Denoncourt caused to be issued a bulletin to "All Oshawa Hourly Rated Employees", copy attached, advising that any employee absent from work without authorization on Monday, December 11, 1995 will be subject to possible disciplinary action. (Tab 14, Schedule D).
30. On or about December 8, 1995, Mr. Denoncourt received, in reply to his letter of December 7, 1995, a letter signed by Mr. John Kovacs. (Tab 15, Schedule D).

[The President of Local 222 replies that Local 222's Shop Committee has voted *not* to participate in a "day of protest" and that no work stoppage would occur without a plant-wide referendum of the members of the local].

31. The Union's position with respect to the St. Catharines facility in the context of the Hamilton protest scheduled for February 23rd and 24th is set out in letters dated January 26th and 30th. [Not relevant - no work stoppage was threatened or occurred in St. Catharines].
32. After the Union announced that it was calling on its members to engage in a work stoppage and day of protest on December 11, 1995, General Motors had a belief that there might be a decline from the average attendance on that day. Accordingly, General Motors declined four requests from employees to take a personal absence day on December 11, 1995. The Union grieved these denials.
33. In the fall of 1994, a work stoppage occurred at approximately 10:00 a.m. when a small minority of workers (upwards of 300 over 2 shifts) on the LAV side stopped working in protest of a company decision to put another worker on notice for discipline. The bargaining committee was in Nigeria Falls at the time. The Committee returned immediately when contacted about the problem. The Committee met with the protesting workers who had absented themselves and persuaded them to return to work. The work stoppage affected only the LAV side. It lasted approximately seven to eight hours. There was no complaint filed by the company at the Ontario Labour Relations Board or in the grievance procedure, and the company took no other action in connection with the matter.
34. Before December 11, 1995, the National Union and various local unions had arranged and carried out various protests, marches, picketing, etc. that were scheduled in such a way that they did not interfere with working time and did not affect production. These protests, marches, picketing, etc. typically protested various actions by General Motors.
35. On February 4, 1996, Mr. Hargrove gave a speech at the Hamilton Teamsters Hall, a portion of which was broadcast on Channel 11 at 5:30 p.m., February 4. A transcript of Mr. Hargrove's broadcast comments is in the Applicant's Supplementary Book of Documents, Tab 5.

"I've got a message for General Motors and the corporate world that, by God, if you screw with the labour legislation any further in this province, we're going to shut down the auto industry and keep it down."

21. As I have already noted, the employer's documentary material includes clippings from various Ontario newspapers published in the months preceding the December 11th work stoppage. These "stories" describe the unions' preparations for the London protest, and include quotes from trade union officials from the OFL and the CAW. The articles (there are similar ones in the union's materials) record that one of the labour movement's primary concerns was "Bill 7", which was before the Legislature in the fall of 1995 and was eventually passed into law in November 1995.

22. Bill 7 was a revision to the *Labour Relations Act* which (among other things) repealed a number of the provisions that had been introduced in 1992 by the former NDP government. The unions were particularly concerned about the way in which Bill 7 changed the legal rules respecting certification and strikes. However, the company's material confirms that trade unionists were also opposed to the policy directions of the new government in other areas as well, and objected to the speed with which the government proposed to introduce its legislative agenda.

23. The union's statement sets out the relevant facts from its perspective.

UNION'S STATEMENT OF FACTS

1. The Applicant, General Motors of Canada Limited ("General Motors"), is party to an existing collective agreement (the "Master Agreement") with National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (the "National Union") and its Local National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Local 27 ("Local 27") (collectively the "Union"). There are supplemental agreements applicable to each Local Union affiliate of the National Union at each General Motors location covered by the master agreement as follows: Local 27 - General Motors Diesel Division; Local 222 - Oshawa; Local 199 - St. Catharines, Ontario; Local 222 - Oshawa, Ontario; Local 303 - Scarborough, Ontario; Local 636 - Woodstock, Ontario; and Local 1973 - Windsor, Ontario. These agreements expire on or about September 14, 1996.
2. The Respondents listed below are employees of General Motors bound by the Master Agreement and are also officers, officials or agents of Local 27. The details of their positions are as follows:

Keith Berry - Shop Committee Person
 Alec Jaconelli - Shop Committee Person
 Craig McLarty - Shop Committee Person
 Hector M. McLellan - Health and Safety Representative
 Larry Richards - Shop Committee Person
 William Walker - Shop Committee Person
 Gary Wegman - Local 27 Plant Chairperson
3. The Respondent, Tim Carrie, is President of Local 27.
4. General Motors manufactures diesel locomotives and light armoured vehicles at its Diesel Division in London.
5. Officials of the Union have publicly supported a "day of protest" against the current government's agenda, including Bill 7.
6. On or about September 6, 1990, a New Democratic Party government was elected for the first time in the province of Ontario.
7. On or about March 8, 1991, a tripartite *Labour Relations Act* Reform Committee consisting of three representatives from both the labour and management communities, and one neutral, Kevin Burkett, was established by the Minister of Labour. The "Burkett Committee" was asked to address at least thirty specific issues of labour law reform.

8. On or about April 19, 1991, two reports were sent to the Minister of Labour by the "Burkett Committee". The "labour side" report contained over sixty proposals for labour law reform. The thirty-nine page report from the management representatives on the Committee did not call for changes to the then current *Ontario Labour Relations Act*.
9. The cabinet submission prepared by the Minister of Labour, dated August 7, 1991 was leaked to the press in September, 1991. It sparked continued debate in the province over the merits of labour law reform.
10. In November, 1991, a discussion paper prepared by the Ministry of Labour with respect to labour law reform was released. Over 20,000 copies of the document were distributed across the province. The Minister of Labour held hearings in eleven cities and heard submissions from in excess of three hundred groups. Four hundred and forty-seven written briefs regarding proposals for labour law reform were received as well.
11. In the course of this broad consultative process executives of General Motors made certain statements which are accurately reported in the newspaper articles cited at Tabs 7, 8, 9 and 10 of the Union's Book of Documents. General Motors does not dispute the accuracy of quotations taken from executives of Ford and Chrysler reported in the same articles.
12. General Motors acknowledges that it was, in 1991 and 1992, a member of a business group called Project Economic Growth and contributed money to this group.
13. These statements referred to in paragraph eleven above were not motivated to compel the company's collective bargaining counter-part or its employees to agree to maintain or change terms and conditions of employment or to agree to modify the rights, privileges or duties of General Motors of Canada Limited.
14. These statements were primarily political in nature, in that they were politically motivated to change the New Democratic Party government legislative agenda regarding Bill 40.
15. The encouragement offered by the President of the CAW-Canada National Union and the Union to workers inside and outside the CAW to express their opposition to the policies of the current Tory Government by joining together in a common day of protest in London, Ontario, on December 11, 1995 was not designed or motivated to persuade or compel General Motors of Canada Limited to change certain terms and conditions of employment at its facility in London, Ontario.
16. The history of political activity of the CAW-Canada and its predecessor, the International Union, United Automobile Aerospace and Agricultural Implement Workers of America (in Canada) is noteworthy and extensive. (See statement on political activity filed herein.)
17. While the applicant is not in a position to dispute or confirm the particular events referred to therein and where opinion is expressed, the applicant does not concur, reference to this history can be made by reviewing passages in books such as:
 - Charlotte Yates, *From Plant to Politics, the Autoworkers Union in Postwar Canada*, Temple University Press, 1993
 - Bob White, *Hard Bargaining, My Life on the Line*, McClelland and Stewart, 1987
 - Sam Gindin, *The Canadian Autoworkers, The Birth and Transformation of a Union*, James Lorimer and Co., 1995.
18. If one were to briefly focus on past "days of protest" that included workers withdrawing their labour to express a political position, one would refer to the June 1, 1987 day of protest against the introduction of labour legislation (Bills 19 and 20) by the British Columbia Provincial Government, in British Columbia. One would also refer to the

October 14, 1976 day of protest, and one could canvass records of history going back to the Winnipeg general strike of 1919, which started as a recognition strike and then evolved into a mass political strike. The respondent states and the applicant does not dispute or confirm that all of its production facilities in Ontario covered by agreements with the (then) UAW were silent due to the mass absence of workers on October 14, 1976. The applicant, at that time made no similar application to the OLRB. (See also supplementary statements and books of documents filed by the union).

19. On or about June 8, 1995, a Tory majority government was elected by the voters of Ontario.
20. The opposition of the CAW-Canada and the Ontario Federation of Labour to the policies of the Tory party, particularly those expressed in the so-called "common sense revolution" pamphlet before and after June 8, 1995, is a matter of public record.
21. One part of the legislative agenda announced by the government when the legislative assembly convened on or about September 27, 1995 was changes to the *Ontario Labour Relations Act*.
22. These changes occurred quickly, within approximately five and a half weeks, after the appearance of Bill 7. These changes occurred without public hearings or legislative committee review. The first reading of Bill 7 occurred on or about October 4, 1995. Second reading occurred on or about October 25, 1995. Third reading was completed on or about October 31, 1995, and royal assent was given on or about November 10, 1995.
23. Throughout the early months of the Tory government, and particularly in September and October 1995, officials and representatives and members of the CAW-Canada engaged in a wide range of political activities geared to oppose the legislative agenda of the Tory government, and educate workers inside and outside the CAW-Canada as to the destructive consequences of same.
24. Educational materials and programs were conducted and delivered with respect to the Tory agenda. Pamphlets were distributed to membership. A special newspaper/pamphlet entitled "A Line in the Sand" was published on several occasions and distributed by representatives of the National Union and Local Unions to workplaces in Ontario, including GM in London, commencing on or about October 10, 1995, shortly after the introduction of Bill 7, and the continuing clarification of the legislative agenda of the Harris government.
25. Throughout this period of time, the President of CAW-Canada spoke to meetings, rallies and demonstrations, protesting the program of the Tory government and urging union membership, and the public at large, to demonstrate their opposition to the Tory government.
26. The CAW-Canada and its Local 27 have participated in the past in several joint committees with the applicant company, and/or have attended as observers and participated in sessions of certain company committees. For example, the Local Union has in the past participated in something called the Quality Process Committee or QPC. The Local Union have participated in joint training and literacy programs. The Union's health and safety representatives has participated in certain meetings of company technical committees. This "joint" participation in programs exists in some other CAW workplaces in Ontario. Many workplaces have labour-management consultation committees. Mr. Hargrove in October and the first two weeks of November urged local unions to stop all such cooperative or joint programs, and to refrain from any cooperation with employers unless doing so adversely affected the exclusive interests of workers.
27. On or about November 13, 1995, it was decided by the Ontario Federation of Labour and its affiliates, that a one day "day of protest" would be organized in the City of London, Ontario. The CAW-Canada was one of many unions, community groups, and organizations that supported this protest. The CAW-Canada urged workers to absent themselves from work and demonstrate their unhappiness with the Tory agenda. The

announcement of the Day of Protest on November 13, 1995 was given significant coverage in the London media.

28. An ad hoc OFL/London Labour Council committee was struck to organize the December 11 day of protest, very shortly after the Ontario Federation of Labour decided to proceed with such an event in London. The full time members of the Committee included two staff people from the Ontario Federation of Labour, two staff people from the Canadian Labour Congress, one official from OPSEU as well as Rick Witherspoon from the CAW.
29. The Committee used offices donated by the Tolpudle Housing and Office Coop at the corner of Dundas and Adelaide in downtown London. Office space was also donated by the American Federation of Grain Millers and the Brewery Workers Union. Funds to pay for telephone, fax, mail and paper charges came from the OFL. Some of the pamphlets referred to in paragraph 24 above were prepared by the OFL.
30. Representatives of the Committee met with the Chief of Police, Julian Fantino six times between November 13 and December 11, 1995. A parade route was given to the Chief in advance of December 11, 1995. The Chief was also informed of the existence and names of parade marshals.
31. The Committee made close contact with community groups in London in the weeks leading to December 11, 1995. A special leaflet for community groups and citizens was drafted and handed out in malls, street corners, bus shelters and transfer points, and in certain areas of London. The Committee coordinated its efforts with the "Lazareth" group, a coalition of community groups i.e. Lifespin, and Street Connections.
32. The Committee and the OFL purposefully conducted a community outreach program to organize as much community involvement and support for the day as possible. For example, on or about December 2, 1995, Susan Eagle, a Minister from the United Church, spoke to a "fight back rally" in advance of the December 11, 1995 protest. Anti-poverty groups, women's groups and religious groups became part of and/or supported the day of protest.
33. Several religious leaders signed a document entitled "Call for Social Justice" a joint statement of support for the December 11, 1995 day of protest. Placards in the demonstration which made its way through some streets of London included messages from the CAW-Canada, various affiliates of the OFL and environmentalists, feminists, students and poverty activists.
34. In between the announcement of the Day of Protest, made on or about November 13, 1995 and the Day of Protest itself the Tory government introduced an economic statement and Bill 26 - an omnibus bill. Bill 26 generated significant opposition from the OFL and its affiliates and anti poverty community groups. Opposition to Bill 26 was a major theme in the Day of Protest, as well. The introduction of Bill 26 lead to an unusual protest in the Legislative Assembly (see Globe and Mail, December 8, 1995 pages A4, A20; December 7, 1995 page A7).
35. The Progress Building of the Fairgrounds was rented for an indoor rally. Susan Eagle, a United Church Minister, Dean Haskett, Mayor of London, Bob White, President Canadian Labour Congress, and Alexa McDonough, Federal NDP Leader were among the speakers who addressed the rally.
36. Newspapers estimated that the crowd in attendance at the rally consisted of anywhere from 12,000-15,000 persons, despite temperatures outside of minus 30 Celsius. The Canadian Broadcasting Corporation had a temporary broadcast platform set up in the Progress Building and the Newsworld channel produced several segments of interviews and news through the day. A chili-kitchen was established and all proceeds from chili meals sold were handed to charities. The Union agrees that a vast majority of General Motors London Diesel Division production workers absented themselves from work as a protest marking the Day of Protest, or in recognition thereof.

37. The one day "day of protest" was part of a continuum of activities by the CAW-Canada and other unions affiliated with the Ontario Federation of Labour, and other like minded community groups in opposition to the legislative agenda of the Tory government.
38. Preparations for the day of protest were extensive. Parade routes were distributed. Police authorities were consulted well in advance of the events planned. The consumption of alcohol was prohibited, in connection with any of the events of December 11, 1995, save, perhaps, for minor amounts of brandy or similar liquor to keep warm. Parade marshals were instructed and organized.
39. The protest and rally and associated events were peaceful, and without any noteworthy untoward incident. The picketing near or at the premises of the applicant, referred to in its application, was also peaceful. Indeed, the police chief for the City of London was quoted in the London Free Press, December 12, 1995 as praising the peaceful protest and said "he couldn't be happier" with the way the protest evolved.
40. No arrests were made, and no charges laid, pertaining to the picketing which occurred at or near the premises of the applicant.
41. The working bargaining unit population of the GM Diesel Division facility in London is approximately 2300 persons.
42. There are six full time shop committee persons, one full time health and safety representative, and one plant chairperson. On two occasions, in the middle, and in late October, 1995, the plant committee distributed a pamphlet entitled "A Line in the Sand" to the bargaining unit employees of the applicant as they entered the plant premises at the start of each shift.
43. Also, a red button protesting Tory Government policies was distributed to workers at the facility.
44. On or about December 6, 1995, an executive representative of the Local Union, not employed by General Motors, distributed, along with other representatives of the Local Union a pamphlet encouraging workers to participate in the "day of protest".
45. Before these meetings, on or about November 21, 1995, and one day after these meetings, that is, December 8, 1995, grievances were filed on behalf of individual workers who had requested to take a personal absence day off on December 11, 1995, and received a flat denial from the company. One grievor, H. Hunt, grievance #10460, requested permission to take December 11, 1995 off as a personal absence day before London, Ontario had been selected as a site of a "day of protest". He received permission from his floor supervisor. Later, this permission was revoked by the applicant, due to the company's blanket direction to all supervision to deny all worker's requests for personal absence or vacation days on December 11, 1995. Other similar grievances were filed on behalf of workers who were denied personal absence days off for December 11, 1995. See grievance nos. 10379, filed November 21, 1995, and grievance nos. 10367 and 10458.
46. In the fall of 1995, that is from September 27, 1995, the day the Legislative Assembly of Ontario convened, until December 11, 1995, there was a significant amount of weekend work scheduled by the applicant with anywhere from 200-300 workers engaged in production work, mainly on the locomotive side.
47. Notwithstanding the scheduled overtime in the fall, in September, 1995, the applicant announced a layoff of 500 persons from the Diesel Division. One hundred workers were laid off in September, 223 workers were laid off on January 8, 1996, and 107 will be laid off in February, 1996.
48. The production schedule for locomotives is not fixed over time. It is not unusual to see the production schedule change due to engineering changes, parts shortages, etc. After

December 11, 1995, the Company did not schedule any mandatory overtime hours. Post-December 11, 1995 overtime hours were approximately the same, or perhaps a little less than pre-December 11, 1995 overtime hours. The union is prepared to agree for the purposes of this application that if the December 11, 1995 Day of Protest had not occurred, it is possible that less overtime would have been worked. After January 8, 1996, overtime hours were reduced. A lay-off occurred on January 8, 1996.

49. The general rule is that deliveries of a certain number of locomotives have to be done by the end of a month. Indeed, in the meeting between Gary Wegman, plant committee chairperson, and Denis Lang, head of labour relations for London Diesel Division, Lang said words to this effect:

“Thank God it is called for December 11th, and not the end of the month, or you would have really screwed up our schedule.”

Mr. Lang intended to convey that if the work stoppage occurred right at the end of the month, there would be no time left in the month to make up for lost production to have timely shipments, whereas there was time after December 11 to work overtime before the end of the month.

50. In December, 1995, the applicant changed delivery schedules and transferred work orders (i.e. deliveries) for eleven locomotives into 1996.
51. With respect to the LAV section of the facility, the union understands that the applicant is paid as each unit is shipped to a client. A line rate of 1.4 units daily has been established by the applicant with respect to LAV's. The line rate is based on a 235-day schedule. The line rate and/or production schedules may be adjusted due to parts delivery and supply, etc. The respondents agree for the purpose of this application only that if the December 11, 1995 Day of Protest had not occurred, less overtime likely would have been worked post-December 11, 1995. Overtime in the LAV section is voluntary. The December schedule for LAV delivery was met by the applicant.
52. This application, as well as another application made by Cami Automotive Inc., a joint venture of General Motors of Canada Limited and Suzuki, are the only applications relating to the December 11, 1995 day of protest pending before the Ontario Labour Relations Board.

24. Attached to the union's statement are declarations from John Clarke, an organizer for the Ontario Coalition Against Poverty, and Bryan Palmer, a history professor.

25. Mr. Clarke declares that his organization supported the London protest because of the government's plan to make reductions in programs for low income people. Mr. Clarke asserts that the situation of poor people would be aggravated by the anticipated changes to various labour laws (Bill 7, employment equity, worker compensation, etc.). Mr. Clarke states that the OCAP was allied with the labour movement in its opposition to such changes; and in his view, it was important to support protests like the one in London in order to send “a powerful message to the government about both the seriousness of the political situation and the depth of opposition by working people to the government's policies”.

26. Professor Palmer's declaration concerns the nature and frequency of political strikes in Canada. He asserts that “political strikes” do not happen very often, however they have occurred from time to time when (as he defines it) “the state takes measures that trade unions view as destructive to the social order and/or the existence of trade unions themselves”. He mentions contemporary examples such as the October 14, 1976 “day of protest” against federal wage-price controls and the “Operation Solidarity” protests in British Columbia in the 1980's. He also cites historical examples such as the 1872 Toronto printers' strike and the 1919 Winnipeg general strike.

27. Like Professor Palmer's declaration, the union's supplementary material extends beyond current events. It describes the historical role of the labour movement in the political process, as well as its rationale for engaging in political activity. Much of this material is internal to the union and describes how it represents its political stance to its members and to the general public. However, there is really no dispute that the labour movement has traditionally played an active role in politics.

28. The union's position rests upon the proposition that labour organizations do not exist in a vacuum. They are affected by the social, economic, and legislative climate in which the union operates. From the union's point of view, its ability to accomplish its objectives is influenced by that social milieu, by the economic and social policies of governments, and by the prevailing legislative framework - collective bargaining, medicare, health and safety, pensions, unemployment insurance, taxation, employment standards, affirmative action, worker compensation, and so on. Collective bargaining takes place in a legislative and societal context which cannot be ignored.

29. The union documents also stress that its members are *citizens*, who are affected like other citizens by public and private actions that influence the quality of life. Trade unions hope to improve the lot of their members both in the workplace and in the community. Both spheres are important. That is why trade unions engage in political activity.

30. The CAW's own "statement on political policy" elaborates on this theme. It is directed to all CAW members, and emphasizes the importance of political involvement across the broad spectrum of concerns that those members may have as trade unionists, as employees, and as members of the community. In this regard, the CAW seeks to ally itself with like-minded organizations within the community, and with the NDP, which is seen as the political party most likely to advance workers' interests. The historical material surveys the fruits and frustrations of these alliances.

SOME OBSERVATIONS ON THE STATEMENTS OF FACT

31. It will be seen that the parties do not really disagree about the actual events of December 11th. Their differences are matters of emphasis and characterization.

32. The employer focuses on the work stoppage itself, the resulting loss of production, and the union's responsibility for orchestrating those losses. The employer looks at the work stoppage through the lens of law and economics. Insofar as politics are concerned, GM claims that it should not be drawn into the union's political dispute with the new provincial government, nor should the company be penalized economically for the legislative agenda of that government. From the company's perspective, the motivation for the work stoppage is irrelevant, because no work stoppage should take place at all during the term of a collective agreement. The company describes itself as an economic actor with commercial concerns, which merely seeks adherence to the negotiated collective agreement and the terms of the *Labour Relations Act, 1995* - both of which guarantee a fixed period of industrial peace free from work stoppages of any kind. The company describes itself as a "third party", embroiled in a political controversy that is not of its own making.

33. The union sketches in a somewhat broader picture.

34. The union emphasizes the historical role of the labour movement in the political arena, the political content of its actions, and the linkage with like-minded groups in the community. From the union's point of view, GM is not a disinterested commercial venture uninvolved in the political process. GM has been an advocate for particular legislative changes, or at the very least expects to benefit from those changes. From the union's perspective, GM is not "neutral" at all, nor is it a disinterested third party in the current political debate.

35. From the union's perspective, its effort (with other unions) to mobilize opposition to Bill 7 is no different from GM's lobbying activities (with other companies) in opposition to the former government's "Bill 40", which was favourable to trade union interests. Bill 40 provided a number of advantages to trade unions. Bill 7 took them away. In both cases unions and employer groups engaged in lobbying - the only difference is the method employed.

36. The union says that in opposing the current government's legislative agenda by means of a work stoppage, it is simply adopting a means that is tailored to the social situation of workers, who, the union argues, lack the resources available to employers and have been shut out of the consultation process. A work stoppage is the way that employees send the kind of political message that the company conveys by other means. It is a form of protest that is not at all uncommon in Europe or the United Kingdom.

37. Hence, what is an "illegal strike pure and simple" from the company's point of view, is a "political protest" from the union's perspective. The company looks at the work stoppage as the unlawful result of unlawful encouragement. The union looks at the work stoppage as the *means* by which it delivers a particular political *message* - to the government and to employers. The company characterizes the work stoppage as a weapon by which the union inflicts economic damage. The union characterizes the work stoppage as a form of "political expression" which the union says attracts *Charter* protection even though it may seem to meet the literal definition of a "strike" found in section 1 of the *Labour Relations Act, 1995*.

* * *

38. The parties' statements describe the events of December 11th in quite different ways, but I think it is fair to say that the work stoppage is neither a "simple strike", nor a pure "political protest". It is an amalgam of the two: a "political strike" in which means and message are totally intertwined. However, because both the context and characterization of that activity can affect the degree of *Charter* protection that can be claimed for it, certain aspects of the situation are worth a little more consideration.

* * *

39. It is evident, I think, that imposing an economic cost on GM and other employers in the London area was an integral part of the union's strategy. That economic loss was not an unforeseen or incidental result of a "political" protest. The GM workers in London were not merely expressing a common concern, or collectively foregoing a day's pay. Nor was the work stoppage a purely symbolic expression - like the pause on Remembrance Day.

40. No doubt there was symbolism and communication involved in the events of December 11, but what gave the protest its "punch" was the intentional disruption of the local economy. The employees voluntarily gave up a day's pay. But employers involuntarily lost a day's production. As President Hargrove explained it, the union was using its collective power in the workplace to further a political objective - something that it had not done before.

41. The work stoppage was planned for a weekday when employees would ordinarily be scheduled to work, and, in GM's case, included the Sunday night shift (11:00 p.m. Sunday to 7:00 a.m. Monday morning) when no public protests were planned at all. These night-shift employees could have worked that Sunday night without in any way compromising their ability to participate in the marches or demonstrations planned for later that day. There was no conflict between their work obligations and participating in these protest activities; moreover, there was no effort to seek an accommodation that would facilitate employee participation in the political demonstrations without loss of production.

There is no evidence that such alternatives were explored, and only a handful of employees asked for time off.

42. In the circumstances, therefore, it really cannot be said that the loss of production was an incidental or unavoidable consequence of the walkout. The work stoppage was *designed* to have that effect, in order to fortify the union's message to the current provincial government and to the employer community as well. That message is clear from the comments of union spokespersons quoted above: there will be an economic price to pay for supporting legislation like Bill 7, and Bill 7 will not foster economic growth or cooperative employer-employee relations which are among its stated purposes.

43. It is also clear that in terms of political impact, it was important for the union to shut down as many employers as possible and to involve major corporations like GM - albeit for only one day. It is no accident that CAW President Hargrove and the TV cameras were both present at the GM picket line that Sunday night, or that President Hargrove took the opportunity to explain the purpose of the protest.

44. The size of the work stoppage and the involvement of major companies attracted media attention which, in turn, made it possible for the union to convey its concerns to a broader audience. Indeed, the work stoppage guaranteed a degree of media coverage that might not otherwise have been available. It provided union leaders with a platform for community debate. So did the linkage with community groups with which the labour movement is allied in interest.

45. The success of that strategy is demonstrated by the amount of press coverage generated by it. Whatever else might be said about the work stoppage in London, a "mini-general strike" was a significant political event, which gave the union a focus for mobilizing its own members, as well as an opportunity to reach members of the public.

46. Nor is it irrelevant that the work stoppage was arguably "illegal".

47. The union knew that its proposed course of conduct might be in breach of the negotiated collective agreement and the provisions of the *Labour Relations Act*. Yet the union forged ahead anyway. In effect, the union was asserting that certain political issues were of sufficient significance to working people that they would not only give up a day's pay, but would risk breaking the law (for one day) if that was what was necessary to convey the depth of their concerns. The union was employing the familiar tactic of *civil disobedience* in order to build solidarity within its own ranks and dramatise its case for the broader public.

48. Finally, if it is conceded (as it is) that trade unions have social and political objectives beyond their pure collective-bargaining role, it must also be said that the December 11th protest was nevertheless "connected" to that collective-bargaining role. One of the main reasons for the protest was the fact that the collective bargaining rules which had shifted in the unions' favour with Bill 40, were shifted in the other direction with Bill 7 (which was entitled "An Act to restore balance and stability to labour relations and to promote economic prosperity and to make consequential changes to statutes concerning labour relations"). The labour movement was opposed to those changes; and in this regard, the government and the labour movement see Bill 7 in much the same way - albeit from very different vantage points.

49. The point is: a political strike to influence the legislative context in which collective bargaining takes place was nevertheless "about collective bargaining" (as well as politics) even though the immediate objective was not to change the employees' terms and conditions of employment.

50. I will examine these questions of characterization later, in conjunction with a review of the *Charter* issues. First it may be useful to consider the state of the law, exclusive of *Charter* considerations. That law was explored 20 years ago in the *Domglas* case, which, in fact, involved a situation that is remarkably similar to the present one.

THE LAW BEFORE THE CHARTER - THE 1976 DOMGLAS DECISION

51. On its face, the strike definition in the Labour Relation Act covers any collective work refusal, regardless of its motive or cause. The definition thus encompasses a wide range of concerted employee activity - including "sympathy strikes" or refusing to cross a picket line - which have the effect of limiting production, but may not be intended to alter the terms of the employees' relationship with their own employer. The ambit of the strike definition is apparent when the "strike" and "lockout" definitions are read together. The lockout definition requires a specific purpose, while the strike definition does not.

52. A "strike" as defined by the *Labour Relations Act, 1995*, does not sever the employment relationship as might have been the case at common law (see section 1(2) of the current Act, and *CPR v. Zambri* [1962] S.C.R. 609). But neither does it require an intention to change the terms of that relationship. It is sufficient if the concerted work refusal is "designed" to limit output; and where the facts establish that there is a common purpose, it is much easier to infer "design" (i.e. it is much easier to infer that the employees intended the production impact that inevitably flows from the concerted action in which they are engaged).

53. The strike definition has been in the statute in its present form since the first *Labour Relations Act* was passed in 1950 - although for most of that time, the scope of the definition was not considered controversial. Nor would most citizens have much difficulty describing the December 11 protest as a "strike" - albeit a political one. However, it was not until *Domglas* (1976), that the strike definition was considered by the Board in overtly "political circumstances"; and since those circumstances are so similar to the ones that gave rise to the instant case, the *Domglas* decision is a useful starting point for any analysis of the current state of the law.

* * *

54. In 1975, the federal Parliament enacted a program of wage and price controls that were to be monitored by a federal regulatory agency. The constitutionality of that legislation was sustained by the Supreme Court of Canada ([1976] 2 S.C.R. 373); however, trade unions remained resolutely opposed to it because of the restrictions on the scope of collective bargaining. To demonstrate that opposition, the labour movement organized a "national day of protest" that took the form of a one-day work stoppage on October 14, 1976.

55. The wage control "protest" took place at workplaces across Canada, and obviously affected employers in a very direct way - even though it was not the product of "normal" collective bargaining and was not called for the purpose of obtaining specific employment concessions. On the other hand, the work stoppage was clearly "about collective bargaining" or "connected to collective bargaining" in a general sense, because the new legislation limited the wages that unions could demand or employers could pay. That was what the unions were complaining about: the law changed some of the rules under which bargaining had formerly been conducted. And as in the present case, the work stoppage was described by trade unions as a "political protest" against a government policy that restricted the rights of workers.

56. One of the employers affected by the threatened work stoppage - *Domglas* - applied to the Ontario Labour Relations Board for a cease-and-desist order, claiming that the "political protest" was

really an unlawful strike. Domglas asserted that the employees' motive really didn't matter: a work stoppage - for whatever reason - would damage the company economically and was prohibited by both the *Labour Relations Act* and its collective agreement with the local union. Domglas sought a restraining order to prohibit the employees from engaging in the threatened work stoppage. In other words, Domglas made the same arguments and sought the same relief as GM in the present case.

57. The union representing the Domglas employees challenged the employer's characterization of the legal situation. The union argued that there had been no breach of the law and no cease-and-desist order could be granted in the circumstances. The union asserted that:

- (a) the threatened work stoppage was not a "strike" within the meaning of the *Labour Relations Act* since it was not "designed" to secure concessions from Domglas; and, in any event,
- (b) the no-strike bar in the *Labour Relations Act* could not foreclose a political protest strike of the kind that the union planned, since that would be an "unconstitutional" restriction on "freedom of expression" and thus was beyond the power of a provincial Legislature.

58. The union submitted that the day of protest was lawful political expression not an unlawful strike, and that this form of political activity could not be restricted by the *Labour Relations Act*. But the Board rejected both of those submissions.

59. After setting out the terms of the strike definition in the Ontario Act, and noting that some provinces had a somewhat narrower provision, the Board wrote:

12. The definition of strike as found in *The Labour Relations Act* appears broad enough to encompass the kind of work stoppage that is the subject matter of this application. On its face, the statutory definition appears to require only that the work stoppage, or other disruption of work, result from the combined or concerted action of employees. The two essential conditions for conduct to be characterized as a strike, therefore, appear to be (1) concerted employee activity; (2) some disruption of the employer's operation. The question is whether we should read into this definition a further condition that the conduct be carried out for the purpose of obtaining concessions from the employer, or some other employer.

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14. Underlying this argument is the assumption that conduct relating to differences between employees and government is unrelated to employer-employee relations. We do not regard this assumption as correct. One only has to apply this assumption to the facts of this application to see the fallacy. The work stoppage, if carried out, would affect the employer-employee relationship since it is evident that the provisions in the collective agreement prohibiting work stoppages would be breached. Section 42 [now 56] of *The Labour Relations Act*, however, expressly states that collective agreements shall be binding upon employers, trade union, and employees. If the respondents' argument were adopted, the result would be that a fundamental obligation contained in a valid collective agreement made under *The Labour Relations Act* would not be protected by the labour board remedial power, so long as it could be established that a work stoppage was not being used for collective bargaining purposes.

15. The definition of strike, moreover, in the absence of the implied qualifications suggested by counsel for the respondents, still appears consistent with the overall scheme of *The Labour Relations Act*. The Act treats the work stoppage as being, in essence, an economic weapon, and restricts its use to a certain collective bargaining situation - the final stages of the negotiation or renewal of a collective agreement. To avoid disruptions in production and to promote industrial relations harmony, all work stoppages occurring outside this limited period, whatever their underlying motive, are prohibited. The wider definition of strike, therefore, is just as consistent with the overall scheme of *The Labour Relations Act* as the more narrow definition suggested by the respondents. It is a

definition, moreover, that is far more consistent with the plain meaning of the Act and the previous interpretations given to the Act by this Board.

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17. To restrict the definition of strike in this manner [i.e. excluding work stoppages which did not have an immediate collective bargaining purpose], moreover, would create substantial uncertainty in its application. What purposes would be considered collective bargaining purposes and what purposes would not? In this case, for example, an argument can be made that, even though the purpose of the work stoppage is to protest the *Anti-Inflation Act*, this purpose still relates to collective bargaining since the *Anti-Inflation Act* affects the collective bargaining process. The identification of the true purpose of a work stoppage, and the characterization of that purpose, would not only be a difficult task, but it would also add an extra element of uncertainty that could only be disruptive of employer-employee relations.

18. Our conclusion is that the definition of strike found in *The Labour Relations Act* is wide enough to encompass the conduct in question. The overriding purpose of the Act is to regulate all aspects of the relationship between the employer and the employees represented by the union of their choice. Freedom to organize employees for collective bargaining purposes is protected by the law, and is no longer a matter of self-help. There now exist strict prohibitions against employer interference with organizing activity, supported in some cases by the procedural device of a reverse onus of proof. The self-help remedy of strike action, in turn, has been severely restricted, to be used only as a method of ultimately resolving collective bargaining disputes. All other strikes, including politically motivated strikes, have been prohibited in order to keep to a minimum conduct disruptive to production and harmful to general labour relations harmony. The strike, in our view, was intended by the legislature to be only a collective bargaining sanction, to be applied in a particular labour relations situation, and to be used in no other context, whether political or otherwise.

60. In the Board's view, it was wrong to read the requirement for a "collective bargaining purpose" into the term "strike", so as to exclude (and thus permit) work stoppages for other reasons. That construction was not implicit in the words of the statute, and, in the Board's opinion, would allow work stoppages in a wide range of circumstances where the Legislature had clearly intended that there be none at all. It would also drag the Board into a definitional quagmire as to what was or was not a "collective bargaining purpose"; and that, in turn, would inevitably generate uncertainty and undermine the goal of industrial peace. The Board asked: how could one reliably define the ambit of the "political" or decide which disputes were or were not "about collective bargaining"? Yet that was the distinction that the union said had to be drawn - not just in respect of the single "day of protest" but also in respect of any other political strike, and indeed, any other work stoppage that was not specifically "designed" to alter the employees' terms and conditions of employment.

61. In the Board's opinion, the union's proposed interpretation was inconsistent with both the words and intent of the statute, and furthermore was a recipe for conflict and litigation - precisely what the broad strike definition was designed to avoid. In the Board's view, the statutory definition was an integral part of the statutory scheme, and could not be read out or read down so as to exclude political strikes. The Board concluded, therefore, that a "political protest strike" was nevertheless a "strike" within the meaning of the *Labour Relations Act*, and as such, could be prohibited during the term of a collective agreement.

62. The Board also rejected the union's "constitutional argument": that a province was prohibited from regulating strikes of a "political character" because basic political freedoms could not be abridged by a provincial legislature.

63. The Board agreed that a provincial restriction on political strikes raised a "constitutional question" of the kind that had been considered by the Courts in cases such as *Re Alberta Legislation* (1938), 2 D.L.R. 811 (S.C.C.). As the Board put it:

There is no doubt in our mind that judicial interpretation has restricted the power of the provinces to interfere with basic political freedoms ...

However, the Board went on to say:

... not every restriction of freedom of expression and association can be recorded as an interference with a basic political freedom ...

In the Board's view, it was a question of balancing valid provincial regulatory claims against their impact on fundamental freedoms (as had been done by the Supreme Court of Canada in *Re Alberta Legislation*):

21. One need only look to *The Labour Relations Act* itself to see the soundness of such an approach. Section 56 [now 70] of the Act restricts certain forms of employer expression - coercion, intimidation, threats, promises or undue influence - that might interfere with the ability of employees to organize. Even though freedom of expression is restricted, no one would suggest that this prohibition is beyond the authority of the provincial Legislature, since not only is there a good industrial relations justification for such a restriction but it is also difficult to characterize this kind of expression as a basic political right. Freedom of association, moreover, is curtailed by the statutory recognition of union security clauses found in section 38 [now 51]. Contractual union security clauses are now allowed to prevail over an individual's desire not to join or support a trade union, except in the limited situation where that desire is based upon a sincere religious conviction or belief. There is, of course, a good industrial relations justification for permitting this restriction upon the freedom of the individual to join or not to join an association and, conversely, the freedom being asserted is not regarded as being a basic political right.

22. The same kind of analysis must be applied to the prohibition in this case. Although we have already found a valid industrial relations justification for this prohibition, the analysis must now be carried further. The remaining question, and it is fundamental, is whether the right to strike amounts to a basic political right that should be protected from provincial encroachment. We think not. The strike in Canada, unlike the situation in some European countries, has seldom been used as a form of political expression. It can hardly be regarded, therefore, as a "traditional form" of the exercise of the right of public debate, and its curtailment can hardly be regarded as substantially interfering with "the working of the parliamentary institutions of Canada". The history of the strike in Canada has been one of its use as an economic weapon in the collective bargaining process. Its transformation into a form of political expression has very recent origins, as we are all aware. This sudden transformation, in our opinion, cannot result in overnight legitimacy as a basic political right. What we have, therefore, is a collective bargaining sanction being used for a political purpose, and not the exercise of a basic political right.

23. This conclusion does not mean that there is no political aspect to the conduct in question. Undoubtedly, the work stoppage does have a political motivation. What we are saying is that the labour relations justification for the wider interpretation of the strike prohibition outweighs the political justification for a more narrow interpretation. This is not the first time that there has been a tension existing between labour relations considerations and the protection of basic political rights. The same kind of problem was faced in *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.* [63 CLLC ¶15,480] (1964) D.L.R. (2d) 1 (S.C.C.), *Koss v. Kohn* [62 CLLC ¶15,388] (1962), 30 D.L.R. (2d) (S.C.C.), and *Smith & Rhuland Ltd. v. The Queen*. In the first two cases, the labour relations justification prevailed, while in the last case basic political rights were regarded as being of greater importance. In all three cases, however, a balancing operation was conducted. It is this kind of balancing operation that we have conducted in this case and, having completed this operation, we have found that the wider interpretation of the strike prohibition does not take this prohibition outside the province's constitutional jurisdiction over labour relations.

64. The Board concluded that the incidental impact on freedom of expression was justifiable, having regard to the overall scheme of collective bargaining legislation and the goal of industrial peace. The restriction on untimely strikes was part of a broader legislative package. The Board therefore

declared that the wage control protest was a strike that could be subject to provincial legal sanctions, and because it occurred during the currency of a collective agreement, the strike was unlawful.

65. I will have more to say about this “balancing exercise” later. At this point, I merely note, parenthetically, that five years before the *Charter*, Professor Carter was rather accurately describing the current post-*Charter* landscape. For as might be expected, a comprehensive scheme of *collective* rights and responsibilities such as the one found in the *Labour Relations Act, 1995*, will clash (at least arguably) in all kinds of ways with the rather general affirmations of *individual* rights found in the *Charter*. Accordingly, it is hardly surprising that since the adoption of the *Charter* in 1982, the right to strike, union security, the “reverse onus” unfair labour practice provisions, first contract arbitration etc. have all been the subject of *Charter* challenges by parties dissatisfied with the particular balance that a provincial legislature has struck. However, to date, these challenges have been unsuccessful, because courts and tribunals have been unwilling to dissect the legislative scheme.

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66. The Board’s decision in *Domglas* was taken to the Divisional Court, where the union challenged both the Board’s interpretation of the statute, and its constitutional analysis.

67. The challenge was unsuccessful on both counts.

68. On the purely definitional question, the Divisional Court agreed with the interpretation adopted Board: a politically motivated work stoppage was still a “strike” within the meaning of the *Labour Relations Act*. Henry J. observed:

In my opinion, it was the deliberate intention of the Legislature in 1950 to adopt the definition of a “strike” “in its broadest sense, without the limitation in the earlier state of the legislation, which related it to a labour dispute between the employer and the employees.... Mr. Cavalluzzo submitted that the work stoppage does not constitute a strike because it was not, as the definition requires, “designed to restrict or limit output” but was designed as an expression of political protest ... the argument is that the purpose must be distinguished from the effect. In the circumstances of this case, I cannot agree ... the effect of the work stoppage cannot in my opinion be divorced from its political purpose. In closing down the employer’s business the union must be taken to have intended the necessary consequence which is to limit production. To cease to produce is to restrict or limit output and in my opinion that by overwhelming inference was part and parcel of the objective of the National Day of Protest as a show of economic as well as political power.

69. The Court then went on to deal with the union’s constitutional argument, which the Court framed in these terms:

The question may be defined this way: Can the Provincial Legislature, by a general prohibition of strikes, (except in the course of collective bargaining), which the Board calls “untimely” strikes, effectively prohibit such concerted activity by employees when it is designed to assert a point of view as part of the democratic process, whereby the citizen engages in political debate with his elected representatives at whatever level?

70. The Court’s answer to that question was “yes”: provincial legislation in respect of collective bargaining *could* validly limit “political strikes”.

71. The Divisional Court majority began by recording those features of the protest strike which the Court considered relevant for its legal analysis. The Court noted:

- “It is a concerted withdrawal of the labour force. The undoubted right of an individual alone to take a day off to attend a meeting, make a speech or take part in a peaceable

demonstration is not here an issue (subject always to submitting to appropriate disciplinary action). What is in question is the collective withdrawal of services from the employer.”

- “The direct effect is to interrupt the employer’s business which he has the right to carry on freely, subject to lawful restraints. The strike infringes this right of the employer. See e.g. *Koss v. Kohn* (1961) 30 D.L.R. 2d 242.”
- “It is not only a means of expressing a point of view; it is also, to a greater or lesser extent, a form of economic pressure, which may amount to coercion. Its effect, irrespective of its motive, is to apply economic pressure or to exert a threat of economic pressure to employers, elected representatives, the government, and the public at large, which can affect the local community or the nation as a whole.”
- “Its inevitable effect is to create disharmony in labour relations between employers and employees ... “
- “The decision to call a strike is a means of protesting federal policy as a conscious choice by the supporters of the Day of Protest to adopt a course of conduct that is generally prohibited instead of a mode of expressing this point of view that is not prohibited.”

The Court’s majority then went on to say:

The question is whether a strike for that purpose can constitutionally be prohibited by provincial legislation. There is no question that the provincial Act is not aimed at or enacted in relation to the suppression of freedom of speech or expression. There is no dispute before us, that the Act as a whole, including section 63 [now 79], is valid provincial legislation in relation to labour relations in the province. If the prohibition against untimely strikes embraces the work stoppage with which we are here concerned, it does so only incidentally, as part of a wider legislative scheme to promote harmonious labour relations, a valid provincial object.

. . .

Freedom of speech and expression connotes the articulation of a point of view, but the withdrawal from the community of any of the factors of production, whether capital, labour or resources, as a result of concerted (not individual) action, in my opinion, is not an aspect of the fundamental freedoms of speech and expression, association, religion or the press. Nor is it a freedom standing by itself. When carried to a sufficient degree, such concerted action must result in holding the local or national society hostage to secure the aims of the participants. That is not freedom of speech; it is coercion that, so far from ensuring the free working of parliamentary institutions, must ultimately impair it.

The statutory limitation on work stoppage for political purposes does not, therefore, constitute a limitation on any of the fundamental freedoms mentioned. So far as I can assess it, it cannot be said to “substantially interfere with the working of the parliamentary institutions of Canada”, so as to place it beyond the purview of the Provincial Legislature.

(emphasis added)

72. Goodman J. agreed in the result, but expressed reservations about whether collective bargaining legislation could prohibit a “pure” political work stoppage such as one against capital punishment - an issue remote from the collective bargaining process. However, he was satisfied that the October 14th work stoppage was an unlawful strike, and was not saved merely because it could be described as a form of “political protest”.

73. In the result, all three judges were satisfied that the Board had reached the right legal conclusion, and that the Board declaration of an unlawful strike should be sustained.

* * *

74. If there were no *Charter of Rights and Freedoms*, there is really not much doubt that the law in Ontario would continue to be as it was declared in 1976 by the Divisional Court in *Domglas*. The strike definition has not been changed since 1976, nor has the correctness of the Court decision been successfully challenged. *Domglas* represents the state of the law, exclusive of *Charter* considerations.

75. However GM argues that *Domglas* not only declares the law as it was in 1976, *Domglas* also governs how “freedom of expression” should be dealt with under the *Charter* in 1996.

76. GM asserts that the strike of December 11, 1995 is analytically identical to the 1976 wage control protest, and that the constitutional characterization of the Court majority - that a political strike is not a protected aspect of freedom of expression - is binding on this Board when it comes to any present day *Charter* analysis. It is not just that the statute is the same as it was before, and has not been changed by the *Charter*. GM would go further: in GM’s submission, the “freedom of expression question” has *already been answered* by the Divisional Court in a constitutional context (see the emphasized portion of the above quote), and thus in a manner binding on the Board. In other words, according to GM, *Domglas* held that a “political strike” is *not* a form of “freedom of expression”, and thus there is no “*Charter* section 2(b) issue” in this case at all.

77. GM concedes that the Divisional Court could not have had the *Charter* in mind in 1976 when it gave constitutional content to the term “freedom of expression”. The *Charter* was not adopted until six years later. However, in GM’s submission, the Court *did* consider what the term “expression” meant in constitutional terms that are now incorporated in the *Charter*, and the Court undertook that analysis in respect of a political strike that was characterized (and defended) as a protected form of expression. But the Court decided that issue against the union in *Domglas*. Thus, in GM’s submission, a political strike is not a form of “expression” that is afforded constitutional protection, the Court decided that issue in 1976, and the Board is bound by that decision today.

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THE LEGISLATIVE SETTING AND SOME DEFINITIONAL DIFFICULTIES

78. Collective bargaining has existed as an industrial relations phenomenon for more than a century, but its modern legal framework dates only from the mid-1940’s, when Canadian lawmakers rejected the British approach (non-intervention except for the common law) and adopted the Wagner Act model that had been introduced in the United States about ten years before. From these beginnings, each of the provinces has developed its own distinctive (but broadly similar) legislative arrangements - reflecting the same general principles, but differing in various ways, in accordance with the economic and political conditions in each province. In general, Canadian legislation tends to be more favourable to trade unions and the establishment of collective-bargaining relationships, less intrusive into internal union affairs, but rather more restrictive when it comes to the regulation of industrial conflict. Industrial peace is a positive objective of public policy - not just the by-product of private collective bargaining arrangements.

79. In Ontario, employees no longer have to strike for recognition, nor is the collective agreement a non-binding “understanding” enforceable only through the threat of a strike (as was the case at common law - see *Young v. CNR* (1931), 1 D.L.R. 645 (P.C.)). A trade union can become the employees’ exclusive statutory bargaining agent upon demonstrating majority support through a statutory process, and thereafter, the employer is required by law to recognize the union as the bargaining agent for all of the employees, and to bargain in good faith (compulsory communication) with a view to concluding a binding collective agreement. The right to join a trade union is protected from employer

interference by an array of unfair labour practice provisions, and institutional stability is promoted by concepts such as “successor rights” or “related employers” (sections 68 and 1(4) respectively) that modify the results that would otherwise obtain if commercial or common law notions were applied. And the regulatory mechanism is administered by a specialized tribunal that is largely insulated from judicial review. One of the distinctive features of the system is that its “legal aspects” have been substantially removed from direct judicial scrutiny: labour law is made by legislatures and tribunals rather than the Courts.

80. The statute provides legal support for trade unions and collective bargaining which did not exist at common law, as well as a variety of features (successor rights for example) that give labour relations law primacy over commercial law conceptions. However, much of the statutory machinery is concerned with promoting or preserving industrial peace - either through direct restrictions on strike activity, or through mechanisms designed to facilitate the resolution of disputes without a work stoppage. The statute reflects a trade-off: collective bargaining institutions are protected and promoted, but, within that framework, industrial peace is assigned a very high priority.

81. Quite a number of statutory provisions can be considered from this perspective: certification replaces a recognition strike as the means to acquire bargaining rights [sections 7-10]; the duty to bargain in good faith creates a mandatory bargaining obligation (compulsory communication) from which a meeting of the minds may emerge without resort to a strike [section 17]; “first contract arbitration” [section 43] provides a non-strike alternative in the sometimes difficult first round of bargaining; compulsory conciliation [sections 18-36] injects mandatory third-party mediation to help the parties resolve their dispute; and so on. A strike remains an essential part of the process, providing a potent incentive for the parties to settle their differences. However, it is a weapon of last resort, and even in the “private sector” its use is carefully circumscribed.

82. In Ontario, a collective agreement must remain in force for a minimum term of one year (section 53) and must contain both a “no-strike clause” and a “rights arbitration clause” to deal with disputes concerning its interpretation or alleged violation. Strikes during a collective agreement are absolutely prohibited. The Ontario Act turns the collective agreement into a mandatory peace treaty of defined duration: the agreement is both an undertaking and a guarantee that during its term of operation, there will be no work stoppages whatsoever.

83. Grievance arbitration (sections 48 and 49 of the Act) is the statutory *quid pro quo* for this prohibition against strikes; and that, in turn, has prompted a fair bit of legislative innovation over the years, in order to enhance the effectiveness of the arbitration process (broad remedial powers - section 48, expedited arbitration - section 49, special provisions for the construction industry - section 137, etc.). The idea is that if strikes are absolutely prohibited, there has to be an effective alternative; moreover that notion has also prompted a fair amount of judicial deference to the arbitration process, as well as a willingness to give comprehensive effect to this statutorily imposed arbitration mechanism (see: *Weber v. Ontario Hydro* (1995) CLLC ¶14,027, *O’Leary v. The Queen* (1995) CLLC ¶14,028, and *St Anne-Nakawic Pulp and Paper Co. Ltd.* (1986), 28 D.L.R. (4th) 449).

84. These legislative and judicial prescriptions merely underline the general thrust of the statute: there can be no strikes while an agreement is in force, and if the parties have some kind of dispute, they must go to arbitration. From both a commercial and community perspective, the expectation is that once the collective agreement is signed there will be industrial peace for its term of operation. That expectation is not only reinforced by the compulsory no-strike and arbitration provisions which are “deemed” to be in every collective agreement, but is also reflected in the range of statutory restrictions and remedies such as those found in sections 79, 81, and 83 and 100 of the Act (set out above). In

addition, in one of the few legislative forays into internal union affairs, section 85 of the Act prevents a trade union from penalizing members who refuse to engage in an unlawful strike.

85. When the legislation is read as a whole, it is evident that the “no-strike pledge” is a critical element of the statutory scheme around which much of the rest revolves. In fact, as the Divisional Court noted in *Domglas*, the no-strike obligation has been an important part of the statute - in the same terms - since the first Ontario *Labour Relations Act* passed in 1950. And while legislative longevity is no proof against a *Charter* challenge, one cannot ignore the fact that no Ontario government has ever tinkered with this part of the statute, and other Canadian jurisdictions have tended to draw the line in much the same way: strikes are routinely prohibited during the term of a collective agreement.

86. Counsel for the trade union points out that political strikes are quite rare in Canada, and are not, strictly speaking, collective bargaining events at all. In his submission, political strikes are such a minuscule proportion of the overall field of strike activity, that they do not pose a significant threat to industrial peace, nor, in his submission do they pose a serious challenge to the overall efficacy of the regulatory scheme. Such strikes tend to be short and symbolic - like the one-day protest on December 11, 1995 or the wage control protest on October 14, 1976 - and thus do not involve a significant loss to an employer or to the general community. In counsel’s submission, that cost is not an unreasonable price to pay for accommodating an important means of employee political expression; moreover, there are (or have been) jurisdictions - British Columbia, for example - which have allowed strikes of this kind without (he asserts) serious societal or industrial relations consequences. There is no need to be an alarmist at the prospect of political protests of this kind.

87. There is something to be said for this submission, but in my view, it does not tell the whole story.

88. It is true that political strikes have been relatively rare in Canada. However, it is less clear what one should make of that fact for present purposes, because it is reasonable to infer that one of the reasons why such work stoppages have been uncommon is that, by and large they are apt to be, and are known to be, *illegal*. Even where there are strikes that have a “political flavour” or have an element of protest about them (the Alberta nurses’ strike for example - see [1988] Alberta LRBR 129 and 115) it is the “unlawfulness” of the strike rather than its “political” element that has been the primary focus of attention.

89. Political strikes do not happen very often because such strikes during the currency of a collective agreement are known to be unlawful - as in *Domglas* - and employees are normally inclined to abide by the law. If there was ever any doubt about that, *Domglas* settled the matter twenty years ago. Conversely, if political strikes were *not unlawful*, there might be quite a lot more of them. In this regard, it is interesting to note that the “Operation Solidarity strikes” in the early 1980’s (mentioned in Professor Palmer’s declaration), prompted the British Columbia Legislature to modify its strike definition so as to bring it into line with the formulation found in Ontario (and elsewhere). That amendment (post-*Charter* be it noted) had the effect of broadening the legislation to make political strikes illegal in British Columbia. And of course if the Ontario statute yields to a *Charter* challenge in this area, the legislation in other jurisdictions would fall as well, and political shutdowns of the kind that we have seen in Ontario over the last few months may indeed become a more familiar feature of the Canadian industrial relations scene.

90. Another factor that may explain why there are so few overtly political strikes in Canada is that in an open society, there are plenty of alternative means of political expression, which do not involve disregarding the law, which do not impose an economic cost on third party employers, and which do not inconvenience the public.

91. The union and the employees it represents are free to hold any political view they choose and express it freely. They can support a political candidate or lobby elected members of the Legislature. They can protest against the government by demonstrating (individually or collectively) on their own time. They can assemble in public places and carry placards. They can take out advertisements promoting their cause, or identifying their concerns. They can devote money to political causes - including funds derived from compulsory union dues that dissenting employees are still obliged to pay (see: *Lavigne v. SEFPO*, [1991] 2 S.C.R. 211). They can provide financial or other support for political parties (subject to election spending laws). They can canvass door to door, or by telephone for a political objective, party, or candidate. They can post signs in public places, organize political rallies, distribute literature to union members and the public, write letters to the press, hold press conferences, or wear political buttons. They may even have a right to promote boycotts of the products sold by companies who appear to support the government. In fact trade unions have done most of these things over the years, and no one suggests that they should not.

92. On the other hand, an unlawful strike is a little different - even though it might be animated by the same concerns that underlie the kinds of political activity mentioned above.

93. The one-day strike in London may seem modest in relation to the union's grievances, or what it sees as unwelcome changes in the legislative landscape, or even in relation to the total number of work days lost in Canada in any given year. But for GM Diesel, the work stoppage represents 6,000 hours of lost production which, GM says, should not have been lost at all. None of the means of persuasion listed above involve the infliction of economic damage on a third party in defiance of explicit contractual and statutory obligations that prohibit such activity.

94. Obviously, a limited one-day work stoppage is not a devastating blow to an employer or to the community at large. But neither is it insignificant. And unlike most of the forms of political mobilization described above, a work stoppage is not merely an effort to persuade or communicate a point of view. It is also a form of pressure that imposes a cost or hardship on others - who may or may not be receptive to the issues in dispute or wish to engage in that kind of debate. A strike is more than just "debate" or "expression".

95. Nor is the concept of a "political strike" quite so clear or quite so limited as the union suggests it is - even though overtly political strikes are relatively rare. For if a "political motivation" or "political objective" is sufficient to remove a "strike" from the ambit of provincial regulation, there may actually be quite a number of strikes that fall into that category - or at the very least, considerable uncertainty about whether a particular strike is "political" or not, and therefore unlawful or not.

96. I shall have more to say later about whether the December 11th "protest" is a form of "political expression" to which the *Charter* applies. At this point, I merely note that this terminology is less useful than might at first be supposed, because it rests upon the assumption that in the collective bargaining sphere, one can readily separate economic from political motives, and economic action from political action. But where exactly is the line between a "collective bargaining strike" in connection with terms and conditions of employment, and a purely "political strike" like the one that is said to have occurred in this case - particularly when even the strike here is "about collective bargaining" in a general sense? How does one distinguish a "political strike", which on the union's view of things is protected under the *Charter* as a form of expression, from an ordinary, "run of the mill collective bargaining strike" (which is also designed to "send a message" to the employer)?

97. Suppose an industry or sector is heavily subsidized by government, and as a result, is able to maintain a certain level of wages. Suppose further that the government decides to withdraw that subsidy, and, in consequence, employers in the industry announce that they will have to reduce wages or lay off employees. If a group of workers declare a strike (day care workers for example), are they

striking against their employer in order to maintain their wages and job security - perhaps hoping that their employer or its customers will put pressure on government? Or are they striking against the government in order to restore the subsidy? If workers in other industries come out in support of the first group, are they striking in sympathy with a wage demand, or in order to press the government to renew the subsidy? And are both strikes now protected forms of political expression, because the real source of grievance is a change in government policy?

98. The former government introduced the so-called “social contract” legislation which restricted public sector wages and generated a considerable amount of protest - although not in that case a general strike. Would a work stoppage to protest that legislation also have been a protected form of “political” action or expression? Or would it have been an unlawful strike? What about a strike by the employees of Ontario Hydro to “protest” the possible “privatization” of that utility - something that one sees mooted in the press from time to time and is certainly a “political issue” of general interest? What about a strike by nurses or teachers to protest controversial changes in the hospital or education sectors? What about a strike to protest a decision by Toronto City Council to introduce labour saving equipment or cease to provide certain public services - for of course, “politics” operates on the municipal level as well?

99. I do not think that it is necessary to multiply the examples. Attractive as it may be to suggest that “political” strikes are (or should be) a rare exception to the general scheme of regulation, it is important to recognize that an exception for political strikes might be a very large exception indeed.

100. Ontario has just recently come through a public service strike, in which a government policy of “downsizing” generated employee concerns and demands about job security. It was a lawful strike; but presumably, if it had occurred last year when the downsizing initiatives were first announced, it might have raised the same issues as this case does. A work stoppage by civil servants might then have been labelled a “political protest” against the changes proposed by the new government. However, to show that the economic and political elements of a work stoppage cannot be kept in watertight compartments, one does not have to refer to the many employees who are civil servants or are working in the broader public sector. The problem would be the same even if there were no public sector at all.

101. In today’s economy, the level of wages, and the degree of employee job security depend only partly upon the private economic decisions of private employers. In all sorts of ways they also depend upon government policies which are more or less controversial - free trade comes to mind, but one could also include policies in respect or health care, social security, unemployment insurance, worker compensation or even tax policies. All of these government decisions have an effect on issues which the union may have to confront at the bargaining table, or could have some arguable impact on the collective bargaining environment, or at the very least have some effect on the lives of workers represented by trade unions. Indeed, it is hardly possible to think of any major labour dispute in which government is not somehow involved, and might therefore be said to have some “political element”. But does that make a protest strike a *Charter* protected form of expression in all of these instances? And does a strike for one week stand on a different footing than a strike for one day, so that at some point the “*Charter* balance” shifts?

102. It is of course a matter of degree. But if (as the union suggests) all strikes can be considered as a mode of expression “delivering a message” to the employer, the public, and the government, a whole range of behaviour formerly thought to be unlawful may now become subject to *Charter* protection and scrutiny - and perhaps “section 1 justification” on a case-by-case basis by labour boards, Courts and arbitrators. That is quite a change to the current system. It is also a recipe for uncertainty, as well as litigation of the kind that has bedevilled the American courts when they were trying to distinguish union expenditures that were or were not “related to collective bargaining”, or the English

courts when they were trying to distinguish between strikes which were or were not “in connection with a trade dispute” (and thus lawful), or “political” (and thus unlawful).

103. I will not belabour the point. Whatever else may be said about the current state of the law, it is clear that the no-strike obligation is a fundamental pillar of the statutory scheme and at least has the virtue of simplicity: there can be no strikes during the currency of a collective agreement - for any reason. The current statute provides both certainty and a guarantee of industrial peace. By contrast, the “political protest exception” proposed by the union is not nearly as narrow or as clear as counsel suggests it is, and opens the door to both industrial conflict and layers of litigation that the Board (and the Courts) have heretofore avoided.

104. With these observations then, I turn to the way in which the Courts have looked at the *Charter* - with particular attention to how they have applied it (or not) in the industrial relations field. But I do so with some reticence - notwithstanding cases such as *Cuddy Chicks Ltd.*, [1991] 2 S.C.R. 5, and, more recently, *Weber v. Ontario Hydro*, [1995] CLLC ¶14,027, which held that a tribunal has the authority to consider issues of this kind.

105. There is now no question that a statutory tribunal may sometimes be obliged to examine its constituent legislation to see whether there is any collision with the rights guaranteed by the *Charter*. However, I think that it is necessary to be circumspect when engaging in that process - particularly, where, as here, the legislation already reflects a web of compromises and, as this case shows, can be the subject of intense political debate. The *Charter* exercise is not like reading two statutes together to discern the legislative intention or to see if they can be harmonized.

106. The Board is a specialized labour-relations tribunal that is created by the legislation that it is required to administer, and when interpreting that statute, the Board brings to bear its own experience with the collective bargaining issues that are the subject of regulation. In many ways the Board is the “master of its own house”: within limits (its interpretation of the statute cannot be patently unreasonable) the Board has a “right to be wrong”. However, (*Charter* issues aside) the Board is ultimately bound by what the Legislature has prescribed - whether or not that prescription reflects the Board’s view of what is “a fair balance of employer or employee interests” or what is “good for labour relations in the province”. Moreover, the Board has no special expertise when it comes to weighing the collective bargaining *values* contained in the *Labour Relations Act* against the general societal *values* now embedded in the *Charter*. Nor is that a function for which an administrative tribunal is particularly well suited - especially given the expedition so often required in labour relations cases.

107. This is not to say that *Charter* questions can be avoided. Indeed, if the Board has no special expertise with respect to *Charter*/constitutional issues, the Courts, for their part, will seldom have much exposure to collective bargaining phenomena; so if a particular case may end up in Court, it may be necessary for the Board to outline the contours of the legislation before testing its congruence with *Charter* rights. A Court that is being urged to “right a *Charter* wrong” is entitled to know whether it is operating on the periphery of the statute or is being asked to fundamentally change the regulatory scheme; moreover a Court may not immediately appreciate the labour relations ramifications of the competing interpretations urged upon it unless the Board sketches them in. Nevertheless, an administrative tribunal should be reluctant to conclude that a central tenet of its constituent statute is unjustifiable in *Charter* terms (and thus unenforceable), in the absence of clear judicial authority supporting that result.

108. In this case, therefore, the Board must be confident that “*Charter* cases” really do establish that a politically-motivated protest strike like the one on December 11, 1995, is protected by the *Charter* and can no longer be prohibited under the *Labour Relations Act*. In that regard, it appears to me that, in recent years, the results in those *Charter* cases have been increasingly influenced by the social and

legislative context in which *Charter* rights have been asserted; so it is necessary to pay particular attention to the way in which the Courts have looked at *Charter* issues in a labour-relations setting.

THE CHARTER - I: Background

109. From a purely political perspective, “free trade unions” and “free collective bargaining” have always been an important component of “free and democratic” western industrial societies. Indeed, the suppression of trade unions has been a common feature of totalitarian regimes of various stripes. However, collective bargaining institutions do not necessarily rest upon a constitutional foundation. Nor are they free from regulation. And the fact that political strikes occur in various countries - especially in Europe - does not mean that such strikes are “legal” in those countries where they occur. There is a distinction to be made between the occurrence of a political phenomenon and the legal regulation of that phenomenon (see generally: *International Encyclopedia of Labour Law and Industrial Relations*, Kluwer Law and Taxation Publishers, 1994, which contains a good survey of how various countries deal with political strikes).

110. In Canada, the right to strike *as such*, has not received constitutional protection, either generally (see *Domglas* above) or under the *Charter*. There is no fundamental or constitutionally protected “right to strike” in Canada. On the contrary. In a series of cases over the last few years, the Courts have consistently affirmed that elected legislatures have considerable latitude to regulate or prohibit industrial conflict - in effect balancing competing claims in the economic arena so as to accommodate the commercial and community interest in industrial peace.

111. These Court decisions establish the legal setting and shape the approach that must be applied in the instant case. It may be useful, therefore, to briefly review their results.

112. In *Reference Re Public Service Employee Relations Act* (1987), 38 D.L.R. (4th) 161 (S.C.C.) several trade unions attacked Alberta legislation which prohibited strikes by public servants. The legislation in question established a *total ban* on strike activity, and established instead, a system of compulsory arbitration which was applicable *at the Crown's discretion* and stipulated the factors that an arbitrator could or could not consider when making an award. Trade unions challenged that ban on *Charter* grounds, arguing that the right to strike was a fundamental one, and an essential aspect of freedom of association.

113. But a majority of the Supreme Court of Canada disagreed. The Court concluded that the right to strike was *not* constitutionally protected under section 2(d) [“freedom of association”] of the *Charter*, so a total ban on strikes could not be challenged on that basis. The Legislature was therefore entitled to enact a total ban on strikes in that particular case (although of course a total ban is not the issue in the instant case, since I am dealing here only with work stoppages that occur during the currency of a collective agreement).

114. In *PSAC v. Canada* (1987), 38 D.L.R. (4th) 249 (S.C.C.) the Court rejected a union challenge to the federal “six and five” wage restraint program, which, among other things, extended existing collective agreements for two years - thereby preventing the re-negotiation of monetary and non-monetary terms of the agreement, and removing the right to strike that would otherwise have arisen when the collective agreements lapsed. Once again, trade unions challenged this limitation on collective bargaining and the right to strike. However, once again, the Supreme Court majority found no constitutional collision.

115. The Court came to the same conclusion in *Saskatchewan v. RWDSU* (1987), 38 D.L.R. (4th) 277, where provincial legislation prohibited strikes or lock-outs in the dairy industry because of the alleged adverse impact on the participants and the community at large. This case involved private sector

actors and activity that would otherwise have been perfectly lawful but for the special legislation taking away the right to strike or lockout. However, once more, the law passed *Charter* scrutiny: the Court held that the Legislature was not prohibited from restricting (there removing) the right to strike.

116. The so-called labour trilogy makes it perfectly clear, therefore, that however fundamental the right to strike may be from a trade union point of view, it is not a right protected by the *Charter*. The right to strike has not been “constitutionalized”. A legislature is entitled to restrict the employees’ right to strike without constitutional impediment.

117. On a much more fundamental level, the right to engage in collective bargaining has also been held to be without constitutional foundation, and thus subject to legislative restriction.

118. In *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)* (1990), 72 D.L.R. (4th) 1 (S.C.C.) a union challenged legislation which required employee associations to be incorporated by territorial enactment before they could legally bargain on behalf of employees. But incorporation was at the discretion of the territorial government: the government retained a discretion to incorporate or not, thus limiting the choice of collective bargaining agents available to employees within its jurisdiction. And in the case of the applicant union, the territorial government refused to provide the necessary incorporation.

119. This feature of the legislation impinged much more directly upon collective bargaining rights than a mere restriction on the right to strike, because it prevented a union from engaging in collective bargaining altogether, and in the case in question, prevented the union from continuing to represent employees that the union had represented for years. However the union’s *Charter* challenge was rejected by the Supreme Court of Canada on the basis that collective bargaining lacked constitutional status or protection. The Court held that collective bargaining was not a fundamental right or freedom rooted in the *Charter*.

120. In *International Longshoremen’s and Warehousemen’s Union v. the Queen*, 92 CLLC ¶14,054 (affirmed by the S.C.C. at [1994] 1 S.C.R. 150), federal “back-to-work legislation” was sustained, despite the union’s claim that the law had been passed precipitously (in four days) without scrutiny by a legislative committee, or consultation with any of the parties affected. The impugned legislation extended collective agreements for two years and prohibited strikes (which is really two sides of the same coin because, by definition, a collective agreement *is* a peace pact). As in the Saskatchewan dairy case, the parties were private sector entities who otherwise had the right to strike/lockout under the *Canada Labour Code*.

121. The union mounted a *Charter* challenge, claiming interference with the employees’ “freedom of association”, as well as interference with their “right to life, liberty and security of the person” (*Charter* sections 2(d) and 7). However, these *Charter* claims were both rejected; moreover, both the federal Court of Appeal and the Supreme Court of Canada commented that the union could not rely on section 7 to bolster a right which found no support under section 2(d) [freedom of association]. In the Courts’ view, the union could not justify “indirectly” under another *Charter* heading what had already been rejected by the Courts under section 2(d). The Supreme Court of Canada said:

We are all of the view that the thrust of the reasoning applicable to section 2(d) of the Canadian *Charter of Rights and Freedoms* adopted in earlier decisions of this Court to determine the scope of freedom of association as it related to the right of union members to strike, applies as well to the determination of the right to liberty under section 7 for the same purpose. This approach completely defeats the general argument of the appellants for holding the Act as a whole invalid under section 7.

122. Having analyzed and balanced the interests in issue under one *Charter* section, the Court was disinclined to repeat that analysis (with differing results) under another *Charter* provision.

123. When this constellation of cases is considered collectively, it is evident that the Supreme Court majorities (sometimes with strong dissents) have not been prepared to accord the “right to strike” any constitutional protection at all, nor have the Courts been prepared to limit the Legislatures’ authority to restrict strike activity. In result at least, the Courts appear to have been animated by the views expressed by McIntyre, J. in *Reference re Public Service Employee Relations Act*. McIntyre J. argued that “constitutionalizing” one element of a dynamic labour relations process (strike regulation) would inevitably and continuously draw the Courts into a labour relations policy-making role for which they were ill-suited. In his view, the regulation of the industrial relations system in response to shifting economic circumstances was best left to legislatures and administrative agencies.

124. Since the “labour trilogy” the Supreme Court majority has been very reluctant to tinker with the labour relations balance struck by the Legislatures in collective bargaining legislation (see also: *Lavigne* [1992], 2 S.C.R. 211 where compulsory dues payments were considered justifiable under the *Charter* because they were part of a broader collective bargaining framework). In the labour relations context, the Courts have left it to Parliament and the provincial legislatures to regulate the collective bargaining process - including what “economic weapons” the institutional parties could use in pursuit of their own interests. The challenges mooted by Professor Carter in *Domglas* have certainly materialized in the last few years, and have led to a certain amount of litigation before Courts and tribunals; but, to date, the Courts have not been inclined to read down or read out portions of provincial labour legislation because of an apparent or arguable conflict with the *Charter*. Despite considerable debate in academic circles (pro and con), the *Charter* has neither “constitutionalized” nor “judicialized” the making of labour law in Canada.

125. Now it is true (as counsel for the union points out) that these cases were primarily “freedom of association” cases under *section 2(d)* of the *Charter*. They did not focus on whether a strike was a “form of expression” protected in some circumstances under *section 2(b)*; moreover, they all involved what might be described as a “normal strike” - that is, one that was intended to alter the terms and conditions of employment. By contrast, the December 11th work stoppage involved - at least in part - a protest against government policy, including changes to the legislation regulating collective bargaining and strikes (Bill 7). The work stoppage under review in this case, had an overtly political component, and was “about collective bargaining” only in a general sense not present in the earlier cases. It is a different kind of strike from the ones that the Court has dealt with before.

126. On the other hand, I do not think that one can ignore the general thrust of these cases, or the Court’s marked disinclination to intrude into the sphere of industrial relations. To put the matter concretely: is it likely that the result in the *Longshoremen’s* case would have been different if, instead of going to Court on a *Charter* challenge, the union had simply gone on strike to protest the restrictive legislation - if, in effect, it had engaged in civil disobedience to dramatize its concern, as the CAW did in this case? What if the union in *PSAC* had gone on strike to protest the “six and five” wage control legislation - as trade unions did in 1976? What if the nurses in the *PIPS* case had gone on strike to protest the territorial government’s limitation on their choice of bargaining agent?

127. Would these then overtly “politically protest strikes” have put them on a different constitutional footing than the underlying legislation that was the subject of concern? Would such protest strikes have then attracted a different degree of *Charter* protection than the object of the protest, because the strike would have then been overtly designed to “send a message” to the government in question that the union opposed the changes in the law? And what about the Alberta nurses case (89 D.L.R. (4th) 609) where the unlawful strike activity involved both an element of expression (see [1988] Alberta

LRBR 129 and 115) and a political protest about the perceived unfairness of a total prohibition on strikes by hospital nurses? Yet the Court did not have much difficulty upholding the Alberta Labour Relations Board's direction that the strike was unlawful.

128. In each of these instances disregarding the law could have been characterized as a form of expression and a political protest against changes in legislation that restricted trade union behaviour in one way or another. But if the underlying law does not involve any breach of the *Charter*, it is difficult to accept that the *Charter* gives special protection to a strike that contravenes that law as a form of political protest or civil disobedience. No one suggests that the *Labour Relations Act, 1995* or Bill 7 itself are "unconstitutional". And as I have indicated in the previous section of this decision: if there is such "political protest exception" to the regulatory scheme, it is one of very significant but quite unpredictable dimensions. At the very least, it represents a very significant change to the statutory scheme, even though the Courts have ruled that neither collective bargaining itself nor the right to strike are protected under the *Charter*.

129. The union's argument involves a fundamental paradox. If neither the right to strike nor collective bargaining legislation enjoy any constitutional protection at all, how is it that a strike in contravention of that legislation *acquires* such protection, merely because it can be characterized as a "political protest" or a form of "political expression"? That seems intuitively wrong, even if there is no case which actually says so.

THE CHARTER - II: Is there some infringement of a stipulated Charter right?

130. It appears to me that despite some judicial authority to the contrary (see *Domglas, supra*, and *Newfoundland Association of Public Employees et al.*, 85 CLLC ¶14,020), the political protest strike on December 11 was a form of "expression" which falls within the umbrella protection found in section 2(b) of the *Charter*. That follows, I think, from the way in which freedom of expression has been defined in cases such as *Irwin Toy Ltd.*, [1989] 1 S.C.R. 927.

131. The first thing to note is that "freedom of *expression*" is not simply freedom of *speech*, but embraces all forms of communication where there is an intention to express some idea or state of affairs to someone else. Second, it appears that expression includes both content and form. No distinction is made between speech and conduct, since the freedom is one of *expression* and not simply *speech*; and conduct can be employed to convey a meaning or message in the same way that words can. Physical activity itself can constitute part of the meaning or expression - or at the very least a method of expression that is inextricably connected to the message itself. Third, the specific content of the communication is not at issue in determining whether the activity conveys or attempts to convey a meaning; so, for example, section 2(b) is broad enough to cover a broad range of expression including "hate speech", commercial advertising, portable placards, advertising leaflets and magazines, "hard core pornography", solicitation by prostitutes, posters placed on hydro poles, and commercial advertising respecting toys or cigarettes. The fact that some of these forms of expression are ultimately found to be unlawful or properly regulated does not remove them from the general ambit of section 2(b).

132. This expansive approach to the concept of "freedom of expression" is discussed in the judgement of Dickson, CJC. in *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927, and more recently (but with differing results) in *RJR McDonald Inc. v. Attorney General of Canada et al.*, [1995] 3 S.C.R. 199. In *Irwin Toy*, Dickson, CJC. put it this way:

We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult

to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2(b) challenge would proceed.

133. *Irwin Toy* also summarizes the values underlying freedom of expression in a society such as ours; namely: (1) the seeking and attaining of truth which is an inherently good activity; (2) the fostering and encouragement of participation in social and political decision-making; and (3) the cultivation of diversity in forms of individual self-fulfillment. Those values are important when one comes to analyze statutes that only *indirectly* impinge upon freedom of expression. In that situation, someone asserting a *Charter* infringement must link the regulated conduct to one of the stated purposes for protecting freedom of expression, if s/he wishes to claim *Charter* protection (see: the discussion in *AG of Ontario v. Dielman et al* (1994), 117 D.L.R. (4th) 449).

134. Section 2(b) of the *Charter* does not “constitutionalize” the mental aspect of all human activity. But it is broad enough to embrace any forms of behaviour which can be considered “expressive” or intended to convey a meaning of some kind. Thus, burning a draft card or the desecration of a flag (to cite some American examples - see *United States v. O'Brien*, 391 U.S. 367, *Texas v. Johnson*, 491 U.S. 397) are expressive conduct which send a potent political message. Such activities are “expression”, even though they are not “speech”. Similarly, in *Weisfeld v. Canada* (1994), 116 D.L.R. (4th) 232, the federal Court of Appeal found that the erection and maintenance of a “peace camp” on Parliament Hill to protest the testing of cruise missiles in Canada, constitutes “expression” within the meaning of section 2(b). In *Weisfeld* the Court noted that “expression” goes beyond words, so that the “props” used to convey or assist in conveying a message more effectively, were part and parcel of the manner of expression, and thus as deserving of protection as the words themselves. In the same vein, picketing was considered a form of expression in *RWDSU v. Dolphin Delivery Limited*, [1986] 2 S.C.R. 573 and *BCGEU v. Attorney General of British Columbia*, [1988] 2 S.C.R. 214 - although in both cases the Court held that a limitation on the employees’ section 2(b) rights was justified under section 1 of the *Charter*.

135. Against this background, (and bearing in mind the distinction between the section 2(b) characterization and its possible section 1 justification) it appears to me that the political protest strike that took place on December 11, 1995 was a form of expression. For the purposes of section 2(b) of the *Charter*, the December 11th strike cannot be separated from the more traditional forms of expressive behaviour which also took place that day (the demonstration, marches, placarding, leaflets, speeches, etc.). Like the picketing in *Dolphin Delivery*, or disregarding the parking rules posed as an example by Dickson, J. in *Irwin Toy*, this particular strike was a form of expression. And so were the means (newsletters, speeches, picketing, etc.) which were employed to “counsel, procure, support or encourage” the strike (to use the words of section 87 of the *Labour Relations Act*).

136. The fact that the strike was arguably unlawful, does not change the character of the communications designed to induce that unlawful response, nor does it remove the strike itself from the ambit of “expression” - just as “hate speech” remains “expression” even though it may be unlawful under the Criminal Code. I might note further that a political protest strike of the kind that occurred in this case, also involves a *kind of “expression”* that is linked to Justice Dickson’s second justification for supporting a broad reading of the concept of “freedom of expression”: a political protest strike *is* a form of participation in social and political decision-making - or at the very least an effort to influence social and political decision-making through expressive (albeit disruptive) behaviour. In this regard a political protest strike is a little different from an “ordinary” strike (i.e. one about terms and conditions

of employment), that might still be considered a form of expression, but would not normally involve any social or political content.

137. In my view, when the union says that the strike on December 11 was designed to “send a message” to employers and to government, the union is using an appropriate metaphor, which accurately describes behaviour that falls within the scope of “freedom of expression” under section 2(b) of the *Charter*. In my view a political strike is expressive activity for the purposes of section 2(b).

138. This does not mean that the strike is “lawful” or that the restrictions in the *Labour Relations Act* are “unlawful”. It merely means that there is a potential conflict with section 2(b) of the *Charter* that has to be justified under section 1 - just as union security provisions in *Lavigne* had to be justified in the view of those judges who saw a *Charter* conflict in that case.

139. It is less clear that section 15, 2(d) or 7 of the *Charter* are engaged; and on balance, I do not think that they are.

140. Although it is self-evident that employees individually are in a vulnerable economic position vis-a-vis employers and market forces (hence the array of statutes designed to protect employees - including the *Labour Relations Act*, 1995), it is less obvious that Canada’s 15 million employees or 4 million trade union members are an historically disadvantaged group subject to discrimination, stereotyping, or disadvantage of the kind to which section 15 of the *Charter* is directed. As the Supreme Court of Canada said in *Re Workers’ Compensation Act*, [1989] 1 S.C.R. 922, “the situation of the workers and dependents here is in no way analogous to those listed in section 15(1), as a majority in *Andrews*, ([1989] 1 S.C.R. 143) state it was required to permit recourse to section 15(1)”.

141. Nor do I think section 15 of the *Charter* is triggered simply because the statute deals in different ways with employers and employees, or creates a schedule of rights that are different from those at common law - particularly where, as here, the *Labour Relations Act*, on balance, removes common law disabilities, including tort restrictions on the right to strike. One of the difficulties with the union’s argument is that if the *Labour Relations Act* does not cover or restrict “political strikes” they may still fall afoul of the common law - as the picketing in *Dolphin Delivery* did - unless the union can once more rely upon the legislation that it says deals with strike activity in a discriminatory way. The union’s description of the discrimination in section 1 of the Act simply highlights the balancing that the legislature has done - for example, when the strike definition is read in conjunction with section 1(2) which protects employees from some of the common law consequences of their actions. And the fact that a statute draws distinctions does not in itself amount to invidious discrimination, let alone discrimination of a kind captured by section 15.

142. Finally, while it is true that a “pure political lockout” *might* not meet the definition of “lockout” found in the *Labour Relations Act*, there has never been a decision that says so, and the lockout definition is “inclusive”. So it is not so clear that a “political lockout” would be lawful under either the legislation or the collective agreement. Moreover, there is no evidence that a “political lockout” has ever occurred or that it is ever likely to occur. I am reluctant to gauge discrimination so as to trigger section 15 of the *Charter* based upon wholly hypothetical behaviour on an employer’s part.

143. However, even if the statutory formula adopted by the Legislature in Ontario triggers section 15 of the *Charter*, or section 7 (despite the *Longshoremen’s* case), or section 2(c), or section 2(d) (despite the “labour trilogy”) - which I do not believe to be the case - the alleged *Charter* infringement may *still* be justified under section 1 of the *Charter*. As I have already mentioned, there is an analytical separation between assessing the behaviour and the legislative provisions which engage a *Charter* right, and determining whether competing social interests justify some limitation on that right. The latter exercise involves section 1 of the *Charter* to which I now turn - and to which I must turn in any event,

given my conclusion that a political protest strike, at the very least, falls within the ambit of section 2(b) of the *Charter*.

* * *

144. In *R. v. Oakes*, [1986] 1 S.C.R. (3d) 1, the Supreme Court of Canada established the analytical framework that is to be used when determining whether a law that infringes a fundamental freedom can nevertheless be saved, because the infringement can be “demonstrably justified in a free and democratic society”.

145. The first step under this test is to establish that the impugned legislation addresses “pressing and substantial concerns”. Only a significant purpose or objective can justify limiting a constitutionally-protected right.

146. Secondly, it must be shown that the means chosen to address this substantial concern are reasonably and demonstrably justified. In other words, the means must be proportional to the objective; which in turn means that they must be rationally connected to the objective, that they must impair the *Charter* right as little as possible. A constitutional right should not be infringed more than is necessary.

147. Finally, the limit must be articulated with sufficient clarity and precision so as to provide an intelligible standard. It cannot be vague or arbitrary.

148. This framework has been continually reaffirmed by the Supreme Court of Canada in a variety of contexts. It is a balancing exercise; moreover, it is a balancing task that requires a purposive approach, placing the conflicting values in their factual and social context. A right may yield to another right or to an overriding public concern in one set of circumstance, but not in another set of circumstances. As McLaughlin, J. stated in *R. V. Keegstra*, [1990] 3 S.C.R. 697:

As Wilson, J. has pointed out in *Edmonton Journal*, this judgment [the section 1 analysis] cannot be made in the abstract. Rather than speak of values as though they were Platonic ideals, the judge must situate the analysis in the facts of the particular case, weighing the different values represented in that context. Thus, it cannot be said that freedom of expression will always prevail over the objective of individual dignity and social harmony or vice versa. The result in a particular case will depend on weighing the significance of the infringement on freedom of expression represented by the law in question, against the importance of the countervailing objectives, and the likelihood the law will achieve those objectives, and the proportionality of the scope of the law to those objectives.

149. The importance of the context was emphasized by McIntyre, J. in the passage from *Reference Re Public Service Employee Relations Act* quoted above, and was evident again in *Lavigne v. SEFPO*, [1991] 2 S.C.R. 211 which will be referred to below. At this point, I note only that when the government is mediating between the claims of different groups within society, each making competing assertions of “rights”, the Courts are less inclined to question the precise balance or formula that the Legislature has struck. As LaForest, J. noted in *McKinney v. Board of Governors of the University of Guelph et al.* (1990), 76 D.L.R. (4th) 545, (an employment law case), “a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures”.

150. Does labour relations legislation address pressing and substantial concerns in our society? The Courts have said that it does. In *Reference Re Public Service Employee Relations Act* McIntyre J. observed:

Labour law, as we have seen, is a fundamentally important as well as an extremely sensitive subject. It is based upon a political and economic compromise between organized labour - a very powerful

socio-economic force - on the one hand, and employers of labour - an equally powerful socio-economic force on the other. The balance between the two forces is delicate and the public at large depends for its security and welfare upon the maintenance of that balance . . .

The regulation of strikes is, of course, an important component of labour law and an essential part of the regulatory scheme, as McIntyre J. noted in *Dolphin Delivery Ltd.* above:

When the parties do exercise the right to disagree, picketing and other forms of industrial conflict are likely to follow. The social cost is great, man hours and wages are lost, production and services will be disrupted, and general tensions within the community may be heightened. Such industrial conflict may be tolerated by society but only as an inevitable corollary to the collective-bargaining process. It is therefore necessary in the general social interest that picketing be regulated and sometimes limited.

These industrial relations consequences are an appropriate subject of legislative concern. And in *Lavigne*, Wilson J. addressed the issue directly:

Is the preservation of industrial peace an objective so pressing and substantial as to warrant overriding a constitutional right [freedom of association]? I think it axiomatic that the answer to this question is “yes”.

151. In *Lavigne*, of course, the issue before the Court was the propriety of the “agency shop” provisions in a collective agreement, which required employees represented by a trade union to pay dues to that trade union whether they liked it or not, and regardless of what the union later did with the money. That “agency shop provision” in *Lavigne* was supported by statute, (compare section 47 of the Act) and thus was “part of a larger framework put in place to reduce industrial conflict” (to use Wilson J.’s words). However, despite the connection noted by Wilson J., a statutory provision respecting dues payments is still rather remote from the actual regulation of strikes and lockouts, or even the regulation of day to day collective-bargaining behaviour from which strikes and lockouts might arise.

152. Enforceable union security provisions are no doubt important for the financial health of the unions involved. But they existed prior to the current statute, are a relatively recent addition to the Ontario Act, and are hardly central to the statutory scheme. Nevertheless, some of the judges in *Lavigne* were satisfied that the connection to that overall scheme was sufficient to save the union security arrangement, even though it infringed the *Charter* in some respects. It was enough that the impugned provision was part of a broader scheme.

153. By contrast, the “no-strike provisions” in this case are central to the statutory framework and go to the heart of the legislative concern about industrial conflict. The whole purpose of these sections of the *Labour Relations Act, 1995* is to limit strikes or lockouts during the term of a collective agreement: to turn the collective agreement into a peace pact for its negotiated term. And unlike the provisions which passed constitutional muster in the labour trilogy, they do not eliminate strikes altogether, or extend the term of the agreement beyond the term that the parties have negotiated. Nor are they to be found in special legislation or legislation covering a specific sector or dispute. We are dealing here with an aspect of the collective bargaining legislation that applies generally to the public and private sector, and permits strike activity at the appropriate time. The provisions of the Act which the union attacks in this case are the same ones that protect the right to strike (there being no constitutional protection) while at the same time imposing limits.

154. It follows, I think, that there is a strong and evident connection between the general goal of regulating industrial conflict, and the specific statutory provisions chosen by the Ontario Legislature to limit strike activity. Sections 1, 79, 81 and 83 of the *Labour Relations Act, 1995* address what the Courts have defined as a pressing and substantial objective, and those sections are rationally connected to achieving that objective. Conversely, if the no-strike provisions are limited by the *Charter* in the way

suggested by the union, the scope for strike activity is correspondingly enlarged - in a manner that is rather difficult to predict, but will significantly change the labour relations landscape in Ontario and elsewhere.

155. Are the no-strike provisions “proportional” to the legislative objective? Or are they legislative overreaching, because a blanket ban on all strikes during a collective agreement necessarily “catches” political protest strikes of the kind at issue in this case?

156. This is the most significant and also the most difficult part of the section 1 analysis, because in the absence of a line of cases in the particular context under review, it is very difficult to predict where the section 1 balance will be struck (compare the opposing views and competing formulations advanced by the Court in *Irwin Toy* and *RJR McDonald*, [1995] 3 S.C.R. 199). The Legislature is obliged to adopt regulatory mechanisms that impair *Charter* rights as little as possible; but as Chief Justice Dickson said in *Irwin Toy*:

What will be “as little as possible” will of course vary depending on the government objective and on the means available to achieve it ... thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a Legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck.

157. All that can be said, therefore, is that: the Courts seem prepared to show greater deference to the Legislature where it is acting in the role of mediator, because of the recognition that social, political, and economic matters are not capable of precision or certainty; that the context is exceptionally important; but that until a Court decides the point in a definitive way (i.e. involving the same legislation and similar facts) it remains open to argument when a particular provision is too broad and when it is not (again, see the competing views expressed by the judges in *Irwin Toy* and *RJR MacDonald*).

158. In the industrial relations field, there are at least two cases where manifestations of industrial conflict were restricted, even though such restrictions involved a limitation on “freedom of expression”.

159. In *Dolphin Delivery* the Supreme Court of Canada approved a *total ban* on secondary picketing, holding that the common law doctrine of inducing breach of contract constituted a pressing and substantial purpose insofar as it supported the conflict-resolution policies of modern labour legislation. The ban was therefore found to be a reasonable limit on expression in the context of an industrial dispute.

160. Similarly, in *BCGEU* the Supreme Court of Canada upheld an injunction to restrain labour picketing and other related activities said to interfere with the operation of courthouses - even though the underlying strike was lawful and no actual disruption had taken place. Chief Justice Dickson ruled that citizens were entitled to unimpeded access to the Courts even where the underlying strike was a lawful one and no actual interference had yet occurred. Dickson J. observed that union members were free to express themselves “in other places and in other ways so long as they did not interfere with the right of access to the Courts”.

161. In both cases, the “expressive activity” - picketing - had spillover effects that interfered with the rights of others, and in both cases it was relevant that there were alternative lawful means of expression.

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162. I think that it is fair to conclude (as the Court did in *Domglas*) that the no-strike prohibition in the *Labour Relations Act* was not enacted in relation to “expression”, even though it may incidentally

affect some forms of expression - here both the protest strike itself, and the discussions with employees that induced them to engage in that strike. I also think that in the circumstances of this case, this particular kind of expressive behaviour (or "protest") falls within the enunciated purpose behind the *Charter* guarantee of freedom of expression. It is a form of participation in social and political decision-making.

163. On the other hand, it is also important to recognize that the *Labour Relations Act, 1995* is not really about "expression", and further, that the no-strike provision is part of a regulatory scheme that is designed to promote both collective bargaining institutions and industrial peace: supporting the process of collective bargaining, but moderating the economic impact on the parties and the public by precisely defining and limiting the circumstances in which a "lawful" strike can take place. If the statute impinges indirectly on some forms of expression, it does so in a context and for a purpose that has little to do with expressing or communicating ideas.

164. The legislation recognizes and protects the employees' right to strike as an essential aspect of the collective-bargaining process. The statute injects structure, limits, and certainty into that process, which were not there at common law. Limitations on the timing of strike activity are but one element in a regulatory mosaic that only indirectly and intermittently affects expression, as part of a broader regulatory framework, with quite different public policy objectives (see the Purpose provisions found at section 2 of the *Labour Relations Act, 1995*; and for a glimpse of what an unregulated system might look like, one has only to look at the experience in the U.K. prior to 1971 - see: A. Flanders *Industrial Relations: What is Wrong with the System?* Faber, London, 1965.)

165. It must also be remembered that a strike is not just "expression" or even "persuasion". It involves economic damage as well. The fact that a strike may *also* be a form of expression does not negate its other important aspects, nor, in my view, immunize strike activity from regulation.

166. A strike produces a kind of harm that the legislatures in Canada have all sought to regulate in various (but similar) ways; moreover, the Courts have suggested that this is the kind of impact that can be properly limited, either to protect a private third-party interest (*Dolphin Delivery, BCGEU*) or the community at large (the Saskatchewan dairy industry case) - there being no constitutionally-protected "right to strike" which might prevail over these other interests. Indeed, since the Courts have *not* sustained a "constitutional" right to strike at all, but *have* sustained a total prohibition in a number of cases, timeliness limitations of the kind at issue here, (that all provinces have had for years), would appear to be towards the "less restrictive" end of the regulatory spectrum. And if proportionality is measured with reference to either community expectations or legislation in other provinces, there is nothing extraordinary or novel about the strike provisions of the Ontario Act.

167. Does an absolute prohibition on strikes during the currency of a collective agreement significantly restrict the means or ability of unions and employees to express themselves on political issues or engage in political debate? No, not unduly, having regard to the other means of persuasion available. There is a whole range of alternative means of political expression which do not impose economic damage on others or disregard contractual commitments and obligations under the *Labour Relations Act*. As the Court noted in *Dolphin Delivery* and *BCGEU*, the availability of alternative (lawful) means of expression which do not impinge upon the rights of third parties helps put the restriction in perspective; and that is also true in this case.

168. Could the Legislature have adopted a less restrictive approach - for example, by exempting "political strikes" in one way or another?

169. Certainly the Legislature could have adopted a formulation like that. But not without prejudice to the overall objective of certainty, stability, containing industrial conflict and preserving

industrial peace. And not without raising the spectre of the kind of litigation which troubled some members of the Court in *Lavigne*.

170. All strikes “send a message” of one kind or other, so an exemption for strikes that involve a “political component” would significantly alter the statutory scheme, as well as the labour relations landscape. As I have tried to illustrate earlier, an exemption like that - while easily stated - would be bound to generate uncertainty in practice, which, in turn, would lead to litigation and collective bargaining discord. It would also completely negate the utility of the no-strike pledge, providing an exception of uncertain dimensions that would only be ascertainable after the fact - and perhaps after a *Charter* analysis by the Board, arbitrators or the Courts.

171. Defining what is or is not a political protest strike (and thus what is or is not “unlawful”) would be at least as difficult as determining when the expenditure of union funds is or is not for “collective bargaining purposes” - something that three of the judges in *Lavigne* considered so burdensome and uncertain in application that it would be unreasonable to require the Legislature to prescribe the limitation in that way. And of course, the immediate result of the strike is rather more serious for employers and the community than whether some minuscule portion of an employee’s compulsory union dues are devoted to some cause with which an employee may disagree. At the very least, a legislated exception for political strikes would probably mean that such strikes would become a regular feature of the labour relations landscape, given the number of government initiatives that could spark such response. Political strikes may or may not be good for the community or the economy; but it is no accident that a highly unionized (and politicized) jurisdiction like British Columbia, which once permitted “political strikes”, has now adopted the more restrictive Ontario approach.

172. When all of these factors are considered, it seems to me that the balancing embodied in the Ontario statute (in common with others in Canada) is within the realm of reasonableness that the Courts have accorded to legislatures when addressing labour relations problems of this kind. In other words, the legislative means - a strict prohibition on strikes during a collective agreement - are not disproportionate in relation to the overall goal of containing industrial conflict, nor does such restriction unduly or unnecessarily impede the employees’ freedom of expression.

173. I find therefore that the impugned provisions of the *Labour Relations Act, 1995* are not inconsistent with the *Charter*. They are demonstrably justifiable under section 1.

174. It follows that the work stoppage on December 11, 1995 was an “unlawful strike” for which the company could seek remedies under the *Labour Relations Act*.

175. It remains to be determined what those remedies should be.

SHOULD THE BOARD ISSUE A “CEASE-AND-DESIST” DIRECTION IN RESPECT OF FUTURE PROTEST STRIKES?

176. Under section 100 of the *Labour Relations Act, 1995* the Board may declare that an unlawful strike has occurred, and, in addition, may “direct what action, if any, a person etc. shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike”. Section 96 of the Act has an equally broad remedial thrust. Both sections give the Board a discretion to fashion whatever relief seems sensible in the circumstances of the case before it.

177. The objective of these provisions is not “punishment” (see the remarks of the Divisional Court in *Radio Shack*, 79 CLLC ¶14,016 and ¶14,017). The “penalty” features of the Act are found in the “consent to prosecute” sections (104 and 109), which are not at issue at all in this case. What the Board does have to do in this proceeding, is fashion an appropriate statutory *remedy*; and when

considering the remedial options, the Board has to assess what will best accomplish the underlying policies of the Act in the particular labour relations setting under review - which here includes the ongoing bargaining relationship of the parties, and the somewhat unusual context in which this particular unlawful work stoppage has occurred.

178. In unlawful strike situations a restraining order prohibiting future misconduct will often be the most effective remedy, even when the strike is long over. But it is not the only remedy, nor is it automatic.

179. Counsel for GM argues that the union and its members have deliberately flouted the law, and that a further violation is a real likelihood. In counsel's submission, it is just a matter of time until the announced pattern of protest strikes once again hits a community in which GM has a plant, or reaches its promised finale with a province-wide shutdown. Counsel submits that in either case, GM will suffer further economic losses; and, to avoid that result, GM urges the Board to issue a cease-and-desist direction. In GM's submission, a direction of this kind is necessary in order to discourage future protest strikes, and reinforce the "no strike pledge" which GM says lies at the heart of both the collective agreement and the statutory scheme. GM points out that the Board normally issues a cease and desist direction when an unlawful strike has occurred and is likely to be repeated.

180. There is much to be said for GM's argument. However, I am not persuaded that a cease-and-desist direction is the most appropriate remedy *at this time*, and having regard to all the circumstances of this case.

181. The December 11 protest was not a typical "wildcat strike" triggered by some labour relations problem in a local workplace; and it would be wrong to treat it that way or ignore the broader social setting. A multi-employer political protest is both qualitatively and quantitatively different from the kind of work stoppage that usually engages the Board's attention. For as I have already mentioned, it is more akin to an act of "civil disobedience": a calculated (but limited) defiance of the law, in order to bring Labour's concerns about that law to the attention of the broader community.

182. From that point of view, it appears to me that a declaration (like the one given in *Domglas*) is certainly necessary, in order to warn those persons named in the application (and perhaps others) that the activities in which they were engaged on December 11, 1995 were unlawful, and that if there is a repetition of that unlawful conduct - as GM says there will be - more significant sanctions may follow. A declaration provides formal confirmation that the protest strike was indeed *illegal* and a form of civil disobedience, rather than *legal* and a permitted form of expression protected by the *Charter of Rights and Freedoms*.

183. A declaration clarifies any misapprehension that employees may have had about the nature of their conduct. It confirms that the one day strike was in breach of the *Labour Relations Act* as well as the collective agreement, and is not "saved" by the *Charter*; moreover, to the extent that the purpose of that work stoppage was to "send a message" to the wider community, it seems fitting that the response should include an authoritative declaration that the means employed were unlawful. Whatever the merits of the union's political critique, the employees were protesting the law by breaking the law, and it is useful to state that clearly. For the fact is, however troubled trade unions may be about the current government or Bill 7, the strike contravened a provision of the Act that is central to the regulatory scheme and has been maintained over the years, without modification, by governments of all stripes.

184. However, it seems to me that a declaration is all that is necessary at this point.

185. It is evident that GM was aware of the potential work stoppage well in advance of December 11. The protest strike came as no surprise. But GM took no steps to launch this proceeding prior to December 11. It did not seek cease-and-desist relief until well after the strike was over. In other words, unlike the employer in *Domglas*, GM did not use the legal tools available to it to prevent the economic losses of which it now complains.

186. Now, I do not suggest that GM should be faulted for its forbearance. However, to the extent that GM's reluctance reflects a labour relations judgement about the practical utility (or enforceability) of a restraining order, it is not obvious that the situation has changed with the passage of time. The threat of economic loss was much more immediate then than it is now, when the possibility of a further strike affecting GM remains completely speculative. And, of course, whether or not the Board makes a further remedial order at this point, GM remains free, should it so choose, to discipline employees for strike-related misbehaviour on December 11, and to seek damages at arbitration for any lost profits occasioned by the December 11th strike. If GM has suffered economic losses, those losses can be recovered. Or to put the matter another way: whether or not the Board issues a cease-and-desist direction, the company can be made whole at arbitration for any financial losses that it has suffered, and employees engaging in any future unlawful strike will now understand that they may have more to lose than a day's pay. GM is not without remedy for the economic losses it claims to have suffered.

187. Nor is it so obvious that any new protest strike will affect a GM operation - even if it is called for a municipality in which GM has a plant.

188. It is true that on December 11th, the employees of CAW Local 27 heeded the union's call and respected the picket line, with the result that the diesel plant was effectively shut down that day. However, the company's own material also indicates that Oshawa Local 222 is *not* committed to an unlawful strike merely because it is sponsored by the OFL or the CAW (national); and I think that I can take notice of the fact that quite a number of other trade unionists expressed similar reservations about engaging in unlawful activity, and eventually chose not to take part in the December 11 work stoppage.

189. Accordingly, quite apart from the potential deterrent effect of a Board decision that advises employees that untimely political strikes are unlawful, it simply does not follow that another strike will happen at a GM facility simply because it is called by the union or supported by union officials. In addition, "counselling" an unlawful strike is itself unlawful, and can be challenged if and when it occurs (see sections 81 and 83 of the Act reproduced above). The fact that a direction is not given *now*, does not mean that one cannot be sought *later*, when the need materializes more concretely.

190. It is important to remember that these political protests are not like ordinary wildcat strikes: sudden, unexpected and local. They are highly organized and publicly announced well in advance of the protest date. The public character of the protest is part of its rationale. In consequence, (as in the case of the December 11th protest) GM will have ample opportunity to seek a restraining order if a strike is actually called for a municipality in which GM has a plant, and if it actually appears that GM's employees will be involved in that strike. In that eventuality, GM can renew its remedial request if it so chooses, and the law will have already been settled by this decision - at least to the extent that any "Charter issue" can ever be settled by this Board. In that regard, I am mindful of the concerns expressed by Chairman Carter in *Domglas*:

26. We do consider, however, that the importance and complexity of the issue should be taken into account when determining the appropriate form of relief in this case. The case presented us with not only a difficult labour relations problem, but also a fundamental constitutional issue. We have dealt with both issues and have arrived at a conclusion that we consider to be well supported by legal authority. An administrative tribunal such as a labour board, however, cannot be, and should not be, the ultimate authority on matters affecting the constitution of Canada, such authority belonging constitutionally to the Superior Courts of Canada. However secure we feel about the

correctness of our decision that the work stoppage is an illegal strike, if we were to issue a direction based on our interpretation of the division of responsibilities between the federal government and the provinces, and this interpretation was later overruled by the Courts, then the effect of an order would be to interfere with the exercise of a basic political right, an interference that could not be repaired by any subsequent legal remedy. On the other hand, if we fail to issue a direction, and our interpretation is later upheld by the Courts, the applicant would suffer a short disruption of production that could be repaired by recovery of damages through the grievance arbitration process. These considerations convince us that the balance of convenience in this case dictates some form of relief other than a direction.

191. Those observations are equally applicable to this case.

192. For the reasons already given, I am satisfied that the December 11th protest was an unlawful strike rather than a constitutionally-protected form of political expression. In my view, the law has not changed since *Domglas*. However, as Professor Carter noted, on a constitutional question such as this, the Board is not entitled to curial deference. The Board must “get the law right”; and if the union believes that the Board has “got the law wrong”, the union may seek judicial review in the Courts - as the union did in *Domglas*.

193. From this perspective, a declaration is all that is necessary to provide the union with a vehicle for timely judicial review, should the union wish to take that opportunity. In fact, a bare declaration has some advantages, because it crystallizes the legal issue for the Courts, without raising the spectre of contempt, or the difficult problems of policy which divided the Supreme Court of Canada in *United Nurses of Alberta v. Attorney General for Alberta, et al.* (1992), 89 D.L.R. (4th) 609 (where the union’s violation of a labour board directive was found to be a “criminal contempt” of Court). Just as GM can seek further relief should the situation demand it, the union can seek clarification from the Courts, before the next work stoppage touching GM actually occurs. There is a legal remedy available to the union, should the union wish to pursue it.

194. Finally, I do not think that I can ignore the fact that there have now been protest strikes in London, Hamilton, and Kitchener, involving thousands of employees and dozens of employers, yet this is the only unlawful strike application that any employer has pursued. This is a little surprising given the number of employees and workplaces involved, and the fact that employers are not normally loath to litigate questions of this kind. Unlawful strikes do not happen very often, but when they do, employers do not usually hesitate to seek the relief available to them under section 100 of the *Labour Relations Act, 1995*.

195. There are, no doubt, many reasons why employers might choose not to pursue the full range of remedies available to them in respect of these unlawful strikes. I do not think that it is particularly helpful to speculate about that. However, the fact that most employers did not seek legal intervention suggests that the employer community has not regarded these protests as typical wildcat strikes, or local employer-employee confrontations, or even legal events for that matter. They are something quite different; which reinforces my view, that the situation may not call for the standard “legal” response - at least for now.

196. It also appears that despite (or perhaps because of) the highly-charged atmosphere attending these protests, quite a number of trade unions and employers have been able to make their own arrangements that balance production concerns on the one hand and the ability of employees to participate in this kind of political activity on the other - which is obviously desirable if it can be done within the law. For if an enterprise can accommodate snowstorms, power failures, strikes at feeder plants or a company picnic, it does not seem impossible that the parties could fashion their own local resolution of the competing employer and employee interests at stake here, without legal intrusion or compulsion - which after all is what much of collective bargaining is about. In any event, it certainly

seems that many employers and employees have been able to reach such workplace accommodations without litigation of the kind involved in this case.

197. This is not to say that unlawful conduct should be ignored. I do not think that it can be ignored without undermining the credibility of a statutory scheme from which trade unions derive rights as well as responsibilities. Rights and responsibilities are the two sides of the same legislative coin - in this case legislation that gives institutional support for collective bargaining, even as it confines industrial conflict to the time when the collective agreement is being renegotiated. It is important that both parts of the equation be recognized.

198. Nevertheless, it seems to me that it is important to remember that we are dealing here with *collective bargaining* legislation; and beneath its legal veneer is the more fundamental notion that self-regulation and private ordering are an appropriate (and perhaps the best) method of workplace governance. Given the opportunity, most unions and employers are able to work things out at the local level, to the mutual benefit of both parties. For all that I have said about strikes in this case the fact is, most work place problems are resolved without a strike - or an arbitration case for that matter.

199. It seems to me therefore, that in the rather unique circumstances of this case, that is an option which should be given a chance before one proceeds further down a path that leads to more litigation, judicial involvement in labour relations, and the possibility of civil or criminal contempt. A declaration confirms the legal parameters of the problem, but leaves the parties free at this stage to seek their own voluntary solution within the law - as some trade unions and employers seem to have done already.

DECLARATIONS

200. For the foregoing reasons, the Board declares that on December 11, 1995, employees of the GM Diesel plant in London engaged in an unlawful strike.

201. The Board further declares that the union threatened, called and authorized that unlawful strike, and that the named officers, officials or agents of the union counselled, procured, supported and encouraged the unlawful strike.

202. The Board declares, in addition, that the responding individuals (as well as persons unknown) engaged in activities - including picketing - that they knew, as a probable and reasonable consequence, would cause an unlawful strike.

203. The conduct identified in the preceding paragraphs was contrary to sections 79, 81 and 83 of the *Labour Relations Act, 1995*.

204. Despite the thorough and thoughtful arguments of counsel for the union, I am not persuaded that these sections of the Act are in conflict with the *Charter of Rights and Freedoms*, or that the *Charter* exempts political strikes from regulation.

4366-94-OH Ruth Kidane, Applicant v. Immigrant Women's Health Centre, Responding Party

Evidence - Health and Safety - Practice and Procedure - Applicant employee alleging unlawful reprisal in violation of Occupational Health and Safety Act and seeking to rely on physicians' medical reports - Responding employer objecting to medical reports being received

in absence of viva voce testimony from physicians involved - Responding employer summoning certain medical records of applicant from physicians - Applicant opposing their introduction - Board ruling that onus of calling physicians resting with applicant

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *R. M. Sloan* and *C. McDonald*.

APPEARANCES: *Linda Vannucci-Santini* for the applicant; *T. Hawtin* for the responding party.

DECISION OF THE BOARD; May 6, 1996

1. The hearing of this matter is ongoing. The responding party seeks to introduce certain medical records of the applicant. The applicant opposes their introduction. We received the parties' submissions and have reviewed them. We note that the responding party is fully prepared to maintain the confidentiality of any records it seeks to rely on in this proceeding.

2. At the outset of these proceedings the applicant sought to rely on three medical reports from physicians attending to the applicant. The responding party put the applicant on notice that it was objecting to the reports being received into evidence in the absence of *viva voce* testimony from the physicians involved. Those reports are quite summary in nature. The records that the responding party now seeks to rely on have been subpoenaed from those physicians' files and provide greater detail both as to the described difficulties of the applicant and to the amount and type of treatment involved.

3. In her submissions, the applicant takes the position that these records are irrelevant. We have difficulty accepting this proposition given that the applicant seeks to rely on medical evidence in support of her case. We note that should the applicant now be of the view that no medical evidence of any kind is relevant and seek not to rely on such, the issue of whether the responding party may rely on these records may become academic.

4. However in light of the applicant's current intention to rely on medical evidence the records sought to be relied on by the responding party are, in our view, relevant.

5. The responding party has articulated the real issue underlying this dispute, that is, who bears the onus of calling the physicians. In our view that onus rests with the applicant. She seeks to introduce and rely on documentary medical evidence that the responding party has challenged. The responding party seeks to rely on more complete medical documentation only by way of response. The Board is governed by its own rules and has the authority to admit hearsay evidence, subject always to the weight that ought to attach to such evidence. In this case, given the nature of the issues in dispute, the applicant's reports would be of limited value to the panel. Certainly, should the applicant choose not to call the physicians, yet seek to rely on the medical reports, the responding party is entitled the opportunity to rely on further medical reports in like manner. Should the applicant choose to call the physicians and we hear their *viva voce* evidence, all of the medical reports, whether sought to be relied on by the applicant or the responding party, are relevant only as they inform that *viva voce* evidence, and bear little, if any weight, independently of the *viva voce* testimony. The responding party is entitled to use the documentation for purposes of cross-examination. It should be aware however, that if the applicant chooses not to call the physicians and the responding party seeks to assert a prior inconsistent statement by the applicant, it will be incumbent upon the responding party to call the maker of the report in reply.

6. The responding party seeks to identify these records as ones it intends to rely on. Whether or not these records, or the records that the applicant seeks to rely on, will be admitted in evidence in this proceeding has yet to be determined in accordance with these comments.

1517-94-OH Pauline Au, Applicant v. Lyndhurst Hospital, Responding Party

Discharge - Evidence - Health and Safety - Practice and Procedure - Applicant alleging violation of Occupational Health and Safety Act on basis of discharge described as reprisal for complaint of sexual harassment in workplace - Board earlier issuing bottom line decision declining to dismiss application without a hearing for want of prima facie case - Board concluding that it is not plain and obvious that complaint has no chance of success - Board finding that there is arguable case that sexual harassment is hazard covered by Occupational Health and Safety Act and that complaint may be successful even if it is not

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *R. W. Pirrie* and *Pauline R. Seville*.

APPEARANCES: *Pauline Au* and *Harry Kopyto* for the applicant; *Susan Bisset* and *Shirley Woodward* for the responding party.

DECISION OF VICE-CHAIR K. G. O'NEIL AND BOARD MEMBER PAULINE R. SEVILLE;
June 20, 1996

1. This is a complaint under the *Occupational Health and Safety Act* (the "OHSA").
2. The responding party employer made a preliminary motion to have the matter dismissed for want of a *prima facie* case. The employer challenged the applicability of the OHSA to the facts in question as they involved sexual harassment, as well as arguing that insufficient causal nexus had been pleaded to properly found the complaint. In a decision dated November 10, 1995, the Board dismissed the motion with very brief reasons and reserved its full reasons to the conclusion of the matter. The panel is now informed that an application for judicial review has been filed, although we have not seen any of the material filed in respect of the application. In light of that application, the Board now wishes to provide its full reasons for dismissing the motion.
3. The responding party asked that the matter be dismissed under Rule 24, which provides as follows:

Dismissal Without A Hearing

24. Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing. In its decision, the Board will set out its reasons. The applicant may within twelve (12) days after being sent that decision request that the Board review its decision.
4. The rule refers to the case as pleaded, the salient points of which are summarized below. For the purpose of the motion, they were assumed to be true and provable, although at the end of the day, they may be neither. Many important facts are vigorously denied by the responding party. Obviously, no finding of fact is being made by our setting out the allegations.

The pleadings

5. The applicant asserts three incidents of unwanted touching by her supervisor at work in late 1991 and early 1992 and a fourth in August, 1992 as well as other behaviour at work which are characterized as unwelcome attempts to get close to her physically and personally. In May, 1992, it is alleged that the supervisor had the applicant's office moved next to the men's washroom, as a subtle

form of harassment so that he could walk past her office several times a day and that he then began coming in earlier than usual, so that he could create situations where he was alone with her.

6. It is alleged that tension and stress from the supervisor's conduct adversely affected the applicant's health, including nightmares, insomnia, headaches, crying and transient disorientation.

7. It is pleaded that reports to management about the alleged harassment commenced in January, 1992 and continued through March, 1993 and that in some of those reports she said she was concerned about her safety at work and "reprisal and retaliation" from her supervisor for complaining about the harassment.

8. It is alleged that over the year between February, 1992 and February, 1993, the applicant was subject to differential negative treatment by her supervisor in retaliation for having made allegations of sexual harassment against him, which retaliation was also reported to management. Incidents pleaded include difficulties over scheduling, withholding of information and arranging for her office to be in disarray after a phone relocation.

9. In September, 1992, management informed the applicant that her supervisor had acknowledged the four incidents of unwanted touching and agreed not to touch her again. Arrangements were made for a third person to be present at supervision meetings. In January, 1993, management informed the applicant that the supervisor had been counselled on human rights legislation and the hospital's policy and procedure in this regard, that the supervisor had acknowledged the incidents of unwanted touching but did not feel they were a breach of the Human Rights Code, and that they would look into the matter of the relocation of her office.

10. In April, 1993, managers and staff attended a two-day workshop on harassment in the workplace. In May, senior management took the position that the incidents alleged to be retaliation were reflective of a management style and did not constitute breaches of human rights or reprisals. It is alleged that although she continued to feel unsafe around her supervisor, the applicant put in no further complaints because senior management had refused to acknowledge that the incidents were reprisals or harassment.

11. In a requested amendment to the complaint it is alleged that the applicant was not aware that the OHSA could encompass sexual harassment when it became an issue at work.

12. In November, 1993, the applicant was terminated after a restructuring of her department while her former supervisor retained a social worker position. Neither her applications for employment in one of the new positions nor an application to do volunteer work were ever acknowledged. It is alleged that the reason given by the hospital for her termination, i.e., restructuring, was a convenient way to terminate staff it did not like, and that part of the reason for her specific termination was the allegations she had made of sexual harassment against her supervisor. It is pleaded that in reporting sexual harassment, the applicant was reporting an unsafe condition of work, and thereby acting in compliance with the OHSA, sections 28(1) (a) and (d) and that the termination was in part a reprisal for that, as was the earlier negative treatment by the supervisor.

13. A complaint was filed with the Human Rights Commission on May 18, 1994, and this complaint was filed with the Board on July 28, 1994. This matter was originally scheduled to be heard in September, 1994, at which point the parties agreed to adjourn the matter. The matter was brought back on for hearing in July, 1995.

14. The Human Rights Complaint was withdrawn in August, 1995 after this panel asked for submissions on the issue of staying this application on its own motion in light of the existing proceedings at the Human Rights Commission.

15. The following portions of the OHSA are referred to below:

9.-(18) It is the function of a committee and it has power to,

- (a) identify situations that may be a source of danger or hazard to workers;
- (d) obtain information from the constructor or employer respecting,
 - (i) the identification of potential or existing hazards of materials, processes or equipment, and

• • •

9.-(30) the member shall inform the committee of situations that may be a source of danger or hazard to workers and the committee shall consider such information within a reasonable period of time.

* * *

25.-(1) An employer shall ensure that,

- (a) the equipment, materials and protective devices as prescribed are provided;
- (b) the equipment, materials and protective devices provided by the employer are maintained in good condition;
- (c) the measures and procedures prescribed are carried out in the workplace;
- (d) the equipment, materials and protective devices provided by the employer are used as prescribed; and
- (e) a floor, roof, wall, pillar, support or other part of a workplace is capable of supporting all loads to which it may be subjected without causing the materials therein to be stressed beyond the allowable unit stresses established under the *Building Code Act*.

(2) Without limiting the strict duty imposed by subsection (1), an employer shall,

- (d) acquaint a worker or a person in authority over a worker with any hazard in the work and in the handling, storage, use, disposal and transport of any article, device, equipment or a biological, chemical or physical agent;
- (h) take every precaution reasonable in the circumstances for the protection of a worker;

* * *

27. Without limiting the duty imposed by subsection (1), a supervisor shall,

- (c) take every precaution reasonable in the circumstances for the protection of a worker.

* * *

28. -(1) A worker shall,

- (a) work in compliance with the provisions of this Act and the regulations;
- (d) report to his or her employer or supervisor any contravention of this Act or the regulations or the existence of any hazard of which he or she knows.

* * *

43.(3) A worker may refuse to work or do particular work where he or she has reason to believe that,

- (a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;
- (b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself; or
- (c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker.

* * *

50.-(1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

(3) The Ontario Labour Relations Board may inquire into any complaint filed under subsection (2), and section 91 of the *Labour Relations Act*, except subsection (5), applies with all necessary modifications as if such section, except subsection (5), is enacted in and forms part of this Act.

Provisions of the *Human Rights Code* are relevant by comparison:

5.-(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place or

origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or handicap.

* * *

7.-(2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.

(3) Every person has a right to be free from,

- (a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or
- (b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person. 1981, c.53, s.6.

* * *

10.-(1) In Part I and in this Part ...

“harassment” means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

* * *

32.-(1) Where a person believes that a right of the person under this Act has been infringed, the person may file with the Commission a complaint in a form approved by the Commission.

The Parties’ Arguments

The Employer

16. The responding party’s position is that, much as it decries sexual harassment, it is not a hazard covered by the existing OHSA and a statutory amendment would be required to do that. Further, it is asserted that the facts as pleaded do not establish a causal nexus between any action in compliance with the OHSA and the discharge.

17. Employer counsel argues that the legislation shows by its wording that it was designed to deal with physical structures and the presence of objects or substances in the workplace, rather than people and their conduct or misconduct. The Board is asked to find that it was not meant to regulate interpersonal contact, harassment or stress. Counsel further supports the above argument by reference to the structure of the OHSA, Parts 3 to 10, (notably 10) and the list of matters on which regulations may be, and have been, made. An example is the WHMIS regulation on hazardous materials, in which physical substances are regulated, not people or their conflicts.

18. Counsel for the hospital sought to examine the proposition asserted by the applicant: that sexual harassment is a hazard that presents a risk and thus she acted in compliance with the OHSA under subsections 28(1)(a) and (d) in reporting the existence of the hazard to her employer. Those subsections require a worker to work in compliance with the Act, and to report to the employer any hazard of which she is aware. This was juxtaposed for purposes of the argument with the obligation of management and supervisors to take every precaution reasonable in the circumstances for the protection of the worker (section 25(2)(h) and 27(2)(c)).

19. Counsel argues that the managerial obligation in section 25 (2) must take its meaning from section 25(1) because it is introduced by the words “Without limiting the strict duty imposed by subsection (1)...”. When section 25(1) is examined, one finds the list from (a) to (e). Counsel asserts that all the components of this list relate to physical material and equipment, or the physical state of the workplace, such as things dealt with by the *Building Code Act*. Since section 25(2) is not introduced by wording such as “in addition to the duty in 25(1)”, the duty in 25(2) should be found to relate to the same type of hazard, i.e., hazards relating to physical material and equipment. Counsel observes there is nothing to be found in either section about interpersonal conflict. Thus, the duty to take precautions in 25(2) should be read as deriving its content from 25(1).

20. To illustrate her point, counsel refers to the obligation in section 25(d) to acquaint a worker with any hazard in the work. She asserts that if one accepts the argument that sexual harassment is a work place hazard covered by the Act, the employer would have to tell everyone that the alleged harasser was a hazard. This is argued to be an absurd result and fly in the face of the very delicate nature of the subject in which incidents often occur without other witnesses, and perception invariably plays a role. It is submitted that it would be devastating for this to occur even before any investigation took place. As to the claim that stress is the hazard, counsel queries whether the employer is to warn a worker that he or she might experience stress, to let the worker refuse to work, and to require that all the other workers be told about it? Where is the confidentiality of their medical information? Is the employer required to warn of possible stress every time it increases the level of production required? Similar arguments are made about the duty to disclose upon a work refusal, although the facts of this case do not involve a work refusal.

21. Counsel asserts that if the Board accepts complaints respecting interpersonal conflict, the type of “people problems” that the Human Rights Commission deals with everyday, there is no end to what management would have to tell employees to avoid being accused of not taking every precaution reasonable in the circumstances. The Board is urged to interpret the language of the OHSA in a manner to avoid these results.

22. Looking at section 25(2)(h) and 27(2)(c), counsel says the wording begs the question: what is the worker to be protected from? If sexual harassment is a hazard from which the worker must be protected, so would any of the prohibited grounds of discrimination in the *Human Rights Code*. Taken to its logical conclusion, other types of discrimination or harassment could lead to work refusals or health and safety complaints. In one fell swoop, all the employment-related discrimination sections of the *Human Rights Code* would find themselves under the OHSA. Why have the Code at all, queries counsel. There are broad remedial powers available under both statutes, and they should be interpreted to avoid two tribunals dealing with the same territory. There would be no need for the Human Rights Commission to deal with employment-related problems if the Labour Board asserts jurisdiction over this kind of problem.

23. Counsel submits that if sexual harassment were intended to be covered, it would be logical that the worker would have the protection of Part V, including the work refusal sections, which are the “teeth” of the legislation. However, counsel argues that a reading of the work refusal language makes it clear that the refusal provisions would not be available to a person being sexually harassed. Section 43(3)(a)-(c) make clear reference to the use of any equipment, machine or device, and the physical condition of the workplace. None of these can be reasonably interpreted to include sexual harassment. Counsel observes that the Ministry of Labour’s legal branch agreed with that reading of the sections in a 1982 interpretation bulletin, stating that the legislation was not designed to cover interpersonal conflict.

24. Employer counsel turned to jurisprudence from other tribunals, as there is no decided case on point in the Board's jurisprudence. First, *Bliss v. Treasury Board*, (1987), 6 C.L.A.S. 109, a decision of the federal Public Service Staff Relations Board (PSSRB). An employee feeling stressed by the difficult relationship he had with his supervisor refused to work under the parallel provisions of the *Canada Labour Code*. That wording is not as clear in its reference to the physical condition of the workplace as is the OHSA. Nonetheless, the PSSRB accepted the argument made by the employer before it to the effect that the provisions in the Code should be interpreted to mean a physical condition, and not to include stress. We are urged to follow the reasoning of the PSSRB and to dismiss the complaint on the basis that it does not involve a workplace hazard.

25. Counsel sought to distinguish *Barmaid's Arms*, [1995] OLRB Rep. March 229, a case where an employee was discharged after refusing to work because of threatened violence from a bar patron, and the Board found a violation of the OHSA. Counsel submitted that threatened physical violence is not sexual harassment in any event, and given that the arguments made before us were apparently not before that panel, the decision is not persuasive on the issue before us. We are asked not to take the further step and find that perceived sexual harassment is a workplace hazard.

26. The second prong of the employer's submissions was to the effect that there was no causal nexus between the applicant's discharge and the alleged harassment. Section 50 requires a causal nexus for a successful complaint. Counsel argues that on the facts of the case that are not disputed by the applicant, it simply could not have been true. Counsel observes that the complainant never sought to refuse work or to enforce the work refusal sections, notwithstanding continuing to bring complaints over approximately eighteen months. Further, she never reported any unsafe condition to the hospital's occupational health service nor gave the hospital any medical evidence that the environment of the workplace was having an adverse effect on her health. She was never off sick for more than a total of three days between November 1991 and November 1993. Further, there were no new allegations against her supervisor from March to November 1993. Thus, there were eight months between the last of her allegations and her dismissal due to a reorganization.

27. Employer counsel refers to *Precision Engineering*, [1994] OLRB Rep. May 596. In that decision, the Board dismissed a complaint where the applicant had not sought to invoke the OHSA or the regulations or to refuse to work, arguing that since the applicant did none of those things she should not be allowed to proceed.

28. Referring to *Brunswick Mining & Smelting Corp. v. Savoie*, (1991), 6 C.O.H.S.C. 10 (N.B.C.A.), where an arbitrator's decision was reversed because he had not considered the question of causal nexus in a finding that a discharge was contrary to the relevant health and safety legislation, counsel argues the assumed facts here do not disclose a causal nexus and that the proceeding should be dismissed on that basis.

29. Counsel refers to a requested amendment to the complainant's pleadings dated September 12, 1994 which admits that she was not aware that the OHSA could cover sexual harassment. If she was not aware, counsel says it is absurd to find that she could be seeking its enforcement when reporting the harassment. Counsel says it flies in the face of any just system to be able to remain silent and only raise these matters after the fact.

For the Complainant

30. It was argued on behalf of the complainant that the OHSA is a remedial statute which is deserving of a broad interpretation and that its purpose is to preserve the fundamental integrity of persons. There is nothing in the statute that suggests that the categories of harm have been closed, or that those mentioned were intended to be an exhaustive list or which prohibits the application of the

OHSA to the impugned behaviour. It is submitted that health and safety concerns evolve, and that some may not have existed when the OHSA was introduced. The Board was urged to reject the “flood gates” arguments made, and what is characterized as the narrow and technical interpretation urged by the employer.

31. For the proposition that a hazard does not have to be specifically mentioned to be included in the ambit of the wording “every precaution reasonable in the circumstances”, and that silence on a particular hazard does not need to be assumed to be a conscious decision to exclude the matter from the ambit of the OHSA, we were referred to a number of decisions by adjudicators on appeals from decisions of Occupational Health and Safety Inspectors: *Inco Limited*, File # AP90-118, May 9, 1991; *The District of Halton and Mississauga Ambulance Service*, June 4, 1990 File # AP 90-22, *Westinghouse Canada Inc.*, Nov. 14, 1985, (Jack Burns appeal) and the order of an inspector issued to the Municipality of Metropolitan Toronto, April 14, 1986, which said that “every reasonable precaution” shall include advice set out in the order as to locker, hygiene and eating facilities.

32. The applicant’s representative presented various references in journals and other publications to the effect that sexual harassment is a hazard to health in that it may negatively affect a person’s health. Employer counsel said she was agreeable that the Board take notice that sexual harassment may have detrimental effects on a person’s health.

33. It was submitted that there is a broad spectrum of opinion on the subject of sexual harassment, but that the important point in this case is that whether or not one characterizes the behaviour of the supervisor as such, it resulted in the harm to the applicant’s health to which she reacted in a *bona fide* manner. It was submitted that if the OHSA is not available as a vehicle of complaint, the documented reluctance of victims of sexual harassment to seek redress will be reinforced and their ability to deal with this health hazard will be lessened.

34. The applicant’s representative referred to Board jurisprudence, such as *Canadian Gypsum Construction*, [1978] OLRB Rep. October 897, *Bill’s Country Meats Ltd.*, [1984] OLRB Rep. October 1549, *Frankel Steel*, [1985] OLRB Rep. August 1210, *Art Shoppe*, [1988] OLRB Rep. Aug. 729, and *Crothers Ltd.*, [1990] OLRB Rep. November 1129 for the proposition that no magical words are necessary to invoke the OHSA, and that individuals may experience hazards differently.

35. It was submitted that no specific knowledge of the OHSA was required and by expressing her concerns to management that she was at risk, the applicant was complying with the OHSA. Further, it is asserted that if the applicant sincerely believed she was endangered, that is enough to bring the complaint within the ambit of the OHSA. It was argued that, ultimately, the issue is not whether objectively she was a victim of gender harassment, but whether she believed so sincerely. It was said that there was a danger in the employer’s submission, in that, if specific knowledge of the OHSA is required, the employer could profit by his own malfeasance in not posting the legislation as required. It was submitted that the jurisprudence shows that there is a low threshold for the invocation of the OHSA because of the importance of the protection of workers’ health.

36. Further, it was submitted that being incorrect in one’s invocation of the OHSA or assessment of whether something is safe does not remove the protection of the reprisal sections. See *Firestone Canada Inc.*, [1985] OLRB Rep. July 1044, *Butler Metal Products*, [1988] OLRB Rep. Oct. 1003 and *Bilt-Rite Upholstering Co. Ltd.*, [1990] OLRB Rep. July 755.

37. As to why the Board should entertain this application when the *Human Rights Code* explicitly covers the subject, it is the complainant’s position that there is nothing to prevent both from having jurisdiction. We were referred to a decision of a hearings officer at the Workers’ Compensation Board in Claim 15878672-2, dated June 29, 1990, dealing with sexual harassment and of the Workers’

Compensation Appeals Tribunal, Decision no. 636/91, dated January 28, 1992, dealing with sexual and racial harassment which are argued to be a recognition of the fact that dual jurisdiction can exist over the same facts under different statutory schemes. We were also referred to *Lehman v. Davis*, (1993) 16 O.R.(3d) 338, where a judge of the Ontario Court (General Division) declined to dismiss or stay a wrongful dismissal action pending a human rights inquiry. The judge was of the view that any question of double recovery could be dealt with as a remedial question. We are urged to prefer his view to that of the court in *Ghosh v. Domglas Inc.*, (1986), 57 O.R. (2d) 710, which granted a stay on the basis of concerns that the judge in *Lehman v. Davis* felt could be met.

38. The complainant's representative urges us to take into account the idea that the Board has a more comprehensive jurisdiction and greater remedial powers and that it is more likely to resolve the issue for others as well because of the power to post notices, for example. He cited the fact that the litigation was likely to be less protracted and expensive at the Board than at the Human Rights Commission, and that the complainant would have carriage of the litigation as she would not under the Code. Further, it was argued that the Board had more than adequate expertise to deal with a health issue containing a harassment aspect. However, in the complainant's submission, neither the Board nor the complainant should have to choose. The Board should simply deal with the aspect that is in its jurisdiction as there are different thresholds and purposes to the two pieces of legislation.

39. Although the applicant's representative argued that the Board could apply Human Rights concepts and standards, he said it was far from clear that it was necessary to make a finding that she was being discharged on the basis of sex to deal with the issue of whether she sincerely believed her health was in danger. If the board was concerned about the overlap in jurisdiction, the applicant's representative said that we should not refuse to exercise our jurisdiction. Rather, one proceeding, at the applicant's choice, should be stayed pending resolution of the other.

40. In reply to the employer's arguments about *Barmaid Arms*, cited above, that the behaviour of persons should not be included under the Act, it was submitted that once there is touching, the human being has become part of the physical condition of the workplace. The definition of physical condition will in the end have a large policy component and the fact that the traditional focus has been on toxic substances and physical things may be part of a male perspective inherent in the definition of hazards under the OHSA. It is his submission that there is no reason why the interpersonal behaviour of a manager that affects health should be considered less of a hazard than others more traditionally recognized since it may be equally toxic to health - the fact that the danger from sexual harassment may be more subtle does not make it any less pernicious.

41. It is argued that the results of having harassment or other activity prohibited by the Code under the OHSA where appropriate does not produce such absurd results as the employer argues. In section 25(2)(a) there is a requirement to provide information. It is submitted that there is nothing absurd about providing information about gender harassment. It is submitted that the nature of the hazard may define the content of the duty. The word "reasonable in the circumstances" will mean that the employer is entitled to be reasonable in how it brings the issue to people's attention.

42. As well, it is argued that whether or not the refusal sections are available is not determinative of this case. Moreover, it was argued that it might be a breach of the *Charter* to find that gender harassment was not within the ambit of the OHSA, that the fundamental importance of the *Charter's* guarantee of equal protection of the law for women should be an aid to interpretation on the question of whether this hazard, which affects women almost exclusively, should be recognized.

43. On the causal nexus, we are urged not to find that the mere passage of time between the complaints of harassment and the discharge warrants the dismissal of the complaint. It is alleged that management was upset by the applicant's persistence in reporting the allegations. It is alleged that the

reorganization in the fall was the first opportunity for management to cloak their desire to get rid of her in a reason that could be said to have nothing to do with her reporting of sexual harassment. This issue cannot be evaluated without hearing the evidence, in the complainant's submission. The law is clear that it does not have to be the only, or even the main, reason for the discharge. If any part of the decision to discharge was a reprisal for acting in compliance with or seeking the enforcement of the OHSA, then it is a violation.

44. In order to dismiss at this stage, it is submitted that the Board would have to find that it was impossible for the causal nexus to be made out, unavoidable that the case would fail. It is a question of fact that has to be tried. Once one accepts the fact as pleaded, we are urged not to conclude that there is no way she can succeed.

45. In reply, employer counsel emphasized that the hospital took no issue with the idea that sexual harassment can cause psychological and physical problems. Although counsel accepts that the OHSA is remedial legislation and should be interpreted broadly, she submits that the Board would have to go beyond that to amend the legislation to allow this complaint.

46. Counsel distinguished each of the cases cited by the applicant's representative. She acknowledged that a worker can be wrong in the assessment of the danger and still have protection of the statute, as long as the hazard is under the OHSA. The reprisal provisions have to do with enforcing the statute. Counsel agrees that sexual harassment is a social problem, but observes that it is one for which the legislature has provided another forum.

47. As to *Lehman v. Davis*, cited above, counsel says it is inconsistent with other decisions in which the reasoning is sound. Where there are at least four possible fora for this fact situation, i.e., the Human Rights Commission, the courts in a constructive or wrongful dismissal action, the Board under OHSA and the Workers Compensation Board, the OHSA should be read in a manner that does not countenance a multiplicity of proceedings.

48. In general, it is counsel's submission that the hearing of this matter will be long and protracted and that it is completely unnecessary to hear the evidence in this matter.

* * *

49. We have considered this motion on two bases: Firstly, do the pleadings make out a case for the relief sought? Secondly, should we in the exercise of our discretion nonetheless decline to inquire into the matter?

50. Rule 24 exists so that the Board may terminate pointless or vexatious litigation. It is not productive of time, energy or good labour relations to allow litigation that is doomed to failure to proceed. However, the rule is not intended to be used to control novel or arguable but weak cases. It is for the cases that do not pass the minimum standard of being arguable.

51. The rule was not created in a juridical vacuum. There is a long history in the common law and English and Canadian procedural statutes of provisions for the striking out of pleadings that disclose no reasonable cause of action. The Supreme Court of Canada recently canvassed salient points of that history in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 and reinforced its view of the appropriate standard on preliminary motions to strike. It is that pleadings should be struck only where it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable claim, and is certain to fail, as opposed to unlikely to succeed. At p. 980, the Court says:

Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

It is enough, said the Court, that the plaintiff has some chance of success. Where the success of the case depends on disputed facts, dismissal at the outset is not appropriate.

52. The Board has taken a similar approach under both Rule 24 and its predecessor, Rule 71. See, *J. Paiva Foods*, [1985] OLRB Rep. May 690. In that case the Board briefly reviewed its approach and said that its discretion to dismiss a complaint on the grounds that it does not disclose a *prima facie* case “should only be exercised in the clearest of cases, that is, when the Board is satisfied that there is no reasonable likelihood that a violation can be established.” Similarly see *Caravelle Foods*, [1983] OLRB Rep. June 875 where the Board stated the threshold as a reasonable or arguable case. In *The General Hospital of Port Arthur*, [1986] OLRB Rep. Sept. 1218 the Board noted it should be cautious in exercising its discretion and do so only when the position was “manifestly untenable” and the fact that arguments may be novel, or the case difficult, should not stand in the way of a hearing on the merits. To similar effect see *Elizabeth Balanyk*, [1987] OLRB Rep. Sept. 1121.

* * *

53. Does this action have some chance of success? Is there an arguable case on the pleadings? The majority was of the view that there was, and thus dismissed the motion.

54. The way the motion was argued, the employer was essentially asking for a ruling on a question of law: Is sexual harassment a hazard covered by the OHSA? In our view it is neither necessary nor appropriate to answer that question at this stage. It is sufficient to find, as we have, that there is an arguable case that the question be answered in the affirmative, and/or that the complaint could be successful even if it is not.

55. Our conclusion that there is an arguable case that sexual harassment is covered by the OHSA rests on the fact that the OHSA consists of very general provisions, as well as the more specific ones referred to by employer counsel, which do arguably focus more on inanimate objects than people. The OHSA appears to have been deliberately designed to be flexible enough to respond to a myriad of fact situations and evolving knowledge, and/or appetite for regulation.

56. To start, the Board notes that the word “hazard” is not defined, while the terms “hazardous material” and “hazardous physical agent” are. The latter are terms given content only by regulation. By contrast, the word “hazard” is used in the OHSA in much more open-ended contexts. See, for example, the range of meanings possible in its use in sections 9(18)(a) and 9(30), involving a health and safety committee’s role in identifying and receiving information on “situations that may be a source of danger or hazard”, or section 9(18)(d)(i), involving its role in obtaining information on “potential or existing hazards, of materials, processes or equipment” or in the sections more directly relevant to the case before us, section 25(2)(d) - the duty of an employer to acquaint a worker with “any hazard”, or that of a supervisor to advise of any existing or potential danger in section 27(2)(a) or of workers to report any hazard of which they are aware in section 28(d). It is at least arguable that the Legislature’s choice of wording is flexible enough to include things other than physical conditions, objects or structures in the meaning of the word “hazard”. It chose to use both the undefined form of the word and the terms, “hazardous material” and “hazardous substance”. When the Legislature wished to confine the meaning of a particular kind of hazard it did so. It is at least arguable that this has significance for the meaning to be given to the undefined “hazard”. And it is conceded by the employer that sexual harassment may be hazardous to health.

57. As to the employer's argument that this flexibility is foreclosed by section 25(1), it is not plain and obvious that this is the necessary or only valid interpretation. For example, the existence of section 25(c) which refers to the employer's responsibility to ensure that measures and procedures prescribed (i.e., set out in the regulations) are carried out, leaves the content of s. 25(1) subject to change at any time by regulation and thus it is at least arguable that the content of section 25(1) is not limited in the way argued by the employer.

58. As well, it is at least arguable that the introductory words of section 25(2) have a less limited meaning than that suggested by the employer, which was basically that section 25(2) would be limited by section 25(1). It is arguable that the wording "without limiting the strict duty imposed by subsection (1)" could mean instead that section 25(1) is not limited or eroded by section 25(2). The nature of section 25(2) makes it not unreasonable to suggest that those duties are independent of, even in addition to, those in section 25(1).

59. But in any event, the section relied on by the applicant as that with which she was complying in complaining of sexual harassment, section 28(1)(d), is not dependent on the content of section 25(1) for its meaning, although one would search for a harmonious reading of all the sections.

60. We have also taken into account that the law on sexual harassment as an occupational hazard is not settled. As is demonstrated from the authorities presented, various tribunals are in the process of determining where it will fit within or outside their particular statutory regime. None of the cases referred to as support for declining to hear this matter came to the conclusion without a hearing. And although the PSSRB has found, after a hearing, that sexual harassment is not covered by its legislation, the decision does not deal with wording analogous to that relied on before us, such as "acting in compliance" with the OHSA. The decisions that find stress disability from harassment compensable under *The Workers Compensation Act*, would suggest that it is not plain and obvious that stress and harassment are not occupational hazards in the ordinary or statutory meaning of the words. Indeed, the employer allows that sexual harassment can be damaging to health. See also *Clark v. Canada*, (1994) 3 C.C.E.L.(2d) 73, a decision of the Federal Court of Canada in a wrongful dismissal action where it was found that a female RCMP officer had suffered illness as a result of harassment by her male colleagues. We note that the nature of the claim which was the subject of the Supreme Court of Canada's decision in *Hunt v. Carey Canada Inc.*, cited above, was an attempt to extend the law of conspiracy to an area in which it had not previously been applied.

61. We stress that none of the authorities are determinative, and that we are making no decision here about how the OHSA should ultimately be read in light of what the facts turn out to be. We are merely saying that we are of the view that there is an arguable case. The point of law is not plain and obvious, and thus should not be dealt with at this stage. See also *MacDonald v. Ontario Hydro*, (1994) 19 O.R. (3d) 529, upheld by the Ontario Court, General Division, Divisional Court, (1995) 26 O.R. (3d) 401 and *Toronto-Dominion Bank v. Deloitte Haskins & Sells*, (1991) 5 O.R. (3d) 417.

62. Even if sexual harassment is not a hazard intended to be covered by the OHSA, it is not plain and obvious that the application cannot succeed. This is because of the broad wording of section 50, the anti-reprisal section of the OHSA, as it has been interpreted by the Board. It is arguable that there is support in the jurisprudence for the proposition that one can be wrong about whether something is dangerous, or be ignorant or mistaken about the correct application of the OHSA, and still be protected from reprisals for activity with a health and safety nexus. This too is an area of evolving law, and is not so plain and obvious as to be dealt with as a preliminary point of law. Facts are crucial, and most of the important facts for this aspect of the case are in serious dispute.

63. Further, the application of the provisions of the OHSA relative to work refusal or the duty of the employer to warn in facts involving sexual harassment are not areas of law on which there is any

precedent, nor an area which is particularly suited to being developed without a firm factual basis. Moreover, even if the Board were to accept the argument that a work refusal is unavailable for a hazard that is not derived from the physical condition of the workplace itself, that would not be dispositive of the allegation that there was a hazard of a different kind. Nor is it dispositive of the allegation of reprisal for alleged compliance with the OHSA other than a work refusal.

64. As to the argument that insufficient causal nexus is set out, we are also of the view that the case is not sufficiently clear to warrant dismissal for want of a *prima facie* case. Especially given the reverse onus of proof, it is difficult to say that the causal nexus pleaded is insufficient. Although there is not the immediacy of time between the complaints to management and the applicant's termination that would create a more obvious potential causal link, the lapse in time is not so long as to make it plain and obvious that it cannot succeed. The question of causation involves the determination of the employer's motivation, and has been interpreted to mean that even mixed motivation is a breach of the OHSA. In the majority's view the pleadings are sufficient to establish an arguable case that one of the reasons that the applicant lost her job through reorganization was, as pleaded, that she was attempting to obtain protection from the employer from a situation she considered hazardous to her health and was acting in compliance with the OHSA by reporting what she believed was a hazard. Thus, the motion failed on this ground as well.

* * *

65. We have seriously considered whether, even though there is an arguable case as set out above, in the exercise of our discretion, we should decline to hear this complaint because sexual harassment is much more central to the jurisdiction of the Human Rights Commission than to that of the limited reprisal jurisdiction of the Board under the *Occupational Health and Safety Act*. Pursuant to section 50(3) of the OHSA, it is a discretionary matter as to whether the Board will inquire into a complaint. It is not obliged to do so. For many years, the Board has exercised its discretion to decline to hear complaints because of delay or where the issue was moot. More recently, the Board has further developed its articulation of the scope of its discretion and the circumstances in which it will decline to entertain applications. See, for instance, *Power Workers' Union - CUPE Local 1000*, [1994] OLRB Rep. June 627, where a combination of circumstances, including delay, remedial difficulties, prior parallel litigation, and an overlapping human rights complaint, lead the Board to decline to inquire into a complaint. As the Board said, any of those factors alone or in combination might lead the Board to exercise its discretion to decline to entertain an application.

66. As indicated in our July decision the Board considered staying the matter on its own motion in favor of the then outstanding complaint under the *Human Rights Code*. That application has now been discontinued, and we are no longer faced with the problems of two parallel proceedings and potential inconsistent findings. The Board is very much concerned with duplication of litigation, and might well have deferred this matter had the other proceeding not been ended. However, neither party argued for deferral even when the other complaint was outstanding; the employer opted not to make that motion. We are of the view that these are not the appropriate circumstances for the Board to do so of its own motion.

67. The cases in which the Board has exercised its discretion against inquiring into a complaint are ones in which at least one party has asked it to exercise that discretion, and usually are cases in which the Board has a developed body of jurisprudence and some significant experience, such as the fair representation type of complaint addressed in the *Power Workers* case referred to above. Here, neither party addressed this matter as a question of discretion, and we are in an area of law in which there is no decided case at the Board. The majority is of the view that in the particular constellation of factors before us, it is not appropriate to dismiss the matter on a discretionary basis, despite the practical

and legal problems involved in fitting a subject that is clearly a human rights ground into a statute that does not refer to it directly. The factors we have taken into account include the novelty of the issue before the Board, the lack of a motion before it asking us to exercise our discretion in that manner, the fact that the Board clearly has the jurisdiction to determine whether or not this is a valid health and safety complaint, and that the issue of sexual harassment is not the only issue engaged by the facts pleaded. The pleadings are such that the issue could be framed as well to be whether the applicant was subject to any of the alleged reprisals for the reporting of a health hazard in compliance with the OHSA.

68. Thus we will go on to consider, after a hearing, whether in reporting incidents of alleged sexual harassment the applicant was acting in compliance with or seeking the enforcement of the OHSA, and whether she was fired or otherwise penalized for so doing. We note that if the employer establishes that the termination had nothing to do with any purported exercise of rights under the OHSA, the remedy the applicant seeks, reinstatement, will be unavailable, and it may be unnecessary to decide the other questions.

69. The above are our reasons for setting the matter down for hearing.

DECISION OF BOARD MEMBER R. W. PIRRIE; June 20, 1996

1. As the parties are aware I dissented from the majority's initial decision on November 23, 1995 that the Ontario Labour Relations Board hear this matter. In so dissenting I was responding to the hospital's preliminary motion with respect to the applicability of the OHSA to the issue of sexual harassment in the workplace.

2. I have carefully reviewed the full reasons of the majority as set out above, and I am still of the view that the scheme of Ontario's legislation is such that the OHSA and the OLRA is not the proper legislation under which this case should be heard. The Human Rights Code was designed and enacted to deal in a comprehensive way with issues of harassment in the workplace.

3. At paragraph 54 the majority state in part that "...the employer was essentially asking for a ruling on a question of law; is sexual harassment a hazard covered by the OHSA? In our view it is neither necessary nor appropriate to answer that question at this stage...". With respect, I disagree. The question was squarely put and thoroughly argued by the parties. I can see no reason not to answer the question.

4. I am unable to ascertain what might emerge from the hearing of the case which will go to the issue of jurisdiction which was not addressed in the argument dealing with the preliminary motion. The thought that the Board would conduct a lengthy, emotional and expensive hearing pertaining to this matter and then conclude it did not have jurisdiction is, to say the least, troubling to this writer.

3462-94-U; 3463-94-U; 3511-94-U; 3553-94-U; 3562-94-U; Wm. J. McLaughlin, Applicant v. Ontario Public Service Employees Union and The Crown in Right of Ontario, as represented by the Management Board of Cabinet, Responding Parties; Jeff Metcalf, Applicant v. Ontario Public Service Employees Union and The Crown in Right of Ontario, as represented by the Management Board of Cabinet, Responding Parties; Roger P. Earnshaw, Applicant v. Ontario Public Service Employees Union and The Crown in Right of Ontario, as represented by the Management Board of Cabinet, Responding Parties; Glenn Bearss, Applicant v. Ontario Public Service Employees

Union and The Crown in Right of Ontario, as represented by the Management Board of Cabinet, Responding Parties; Mike Robinson, Applicant v. Ontario Public Service Employees Union and The Crown in Right of Ontario, as represented by the Management Board of Cabinet, Responding Parties

Duty of Fair Representation - Unfair Labour Practice - Applicants asserting that union breached its duty of fair representation by processing their outstanding classification grievances in expedited "mediation-arbitration" system devised to dispose of significant backlog of such cases - Applicants also alleging that both union and employer committed series of unfair labour practices by agreeing to and carrying out expedited process - Applications dismissed

BEFORE: *Roman Stoykewych*, Vice-Chair.

APPEARANCES: *Wm. McLaughlin, Jeff W. Metcalf, Roger Earnshaw, Glenn Bearss and Mike Lee Robinson* on behalf of themselves; *Donald K. Eady, Gerry Griffin, Joan Reid, Rob Field* on behalf of Ontario Public Service Employees Union; *Craig Slater* on behalf of The Crown in Right of Ontario, as represented by the Management Board of Cabinet.

DECISION OF THE BOARD; June 14, 1996

1. These are applications filed pursuant to the provisions of section 91 of the *Labour Relations Act* R.S.O., 1990 c. L2 in which the applicants assert that their trade union, the Ontario Public Service Employees Union ("OPSEU" or "the trade union") and their employer, The Crown in Right of Ontario ("the employer") have violated various provisions of the *Labour Relations Act*. The essence of the applicants' complaint in each case is that by processing their outstanding classification grievances in an expedited "mediation-arbitration" system devised to dispose of a significant backlog of such cases, the trade union is in breach of its duty to represent them fairly. The applicants further allege that by agreeing to and carrying out such a process, both the union and the employer have committed a series of "unfair labour practices".

2. Since the filing of these applications, the Act and other legislation relied upon by the applicants have been amended. (*Labour Relations And Employment Statute Law Amendment Act, 1995*) However, none of the statutory provisions relevant to the present applications have been substantially affected by the amendments in a manner that might affect the disposition of these matters and, since the matter was pleaded and argued before me on the basis of the provisions of the legislation prior to its amendment, for ease of exposition I will refer to such provisions as they appeared prior to the recent amendments.

3. The applicants filed voluminous materials together with their applications in support of their positions. A hearing was held in this matter, during which the Board heard the parties' submissions with respect to the trade union's motion that the applications be dismissed without hearing any evidence. The basis of the request was the assertion that the applications do not make out a case for which the Board would grant a remedy even if all the facts set out in the applications were accepted as true. The Employer supported the trade union's position. Both the trade union and the employer relied upon Rule 24 of the Board's Rules of Procedure, which provides as follows:

24. Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing. In its decision, the Board will set out its reasons. The applicant may within twelve (12) days after being sent that decision request that the Board review its decision.

4. Consistent with the “no *prima facie* case” nature of the trade union’s motion, I have considered only those facts that are asserted in the materials filed by the applicants in support of their applications, as well as those facts that were conceded by them to be true during the course of the hearing. Although a number of such facts are disputed by the trade union and the employer, and although the responding parties have asserted other factual matters, I have not considered such assertions in the course of my decision. Bearing this in mind, the following are the salient facts relating to this application.

5. The applicants are classified employees in the Ontario Public Service and are represented in their employment relationship by OPSEU. As such, their employment relationship was subject to the provisions of the *Crown Employees Collective Bargaining Act*, R.S.O. 1990, c. 50 (“old CECBA”) until its repeal effective February 14, 1994 and thereafter, to the joint operation of the *Labour Relations Act* and the *Crown Employees Collective Bargaining Act*, 1993, S. O. 1993, c. 38 (“new CECBA”). Pursuant to the collective agreement entered into by the parties, each of the applicants had grieved that they were improperly classified (that is, that the classification upon which their wage rates were based did not accurately reflect their duties and responsibilities).

6. The grievances were not resolved during the parties’ grievance procedure and were thereafter adjudicated upon by various panels of the Grievance Settlement Board. Each of the applicants succeeded in establishing that their classification was not correct. Until the events giving rise to this application, each of the applicants were (to use the terminology of the parties’ classification procedures) the subject of outstanding “Berry orders” made by various panels of the Grievance Settlement Board. A Berry order (so named after the order granted in the decision of the Grievance Settlement Board in *OPSEU (Berry) v. Ministry of Community and Social Services*, (affirmed at judicial review *OPSEU v. Ontario (Minister of Community and Social Services)*, (1985) OAC 15 Div. Ct.) is issued upon a finding that a grievor’s classification does not reflect his or her duties and responsibilities and that there is no existing classification that does so. Pursuant to a Berry order, the employer is required to create a classification that properly reflects the duties and responsibilities of the employee concerned.

7. It is important to note that a Berry order, although indicative of a state of affairs in which a grievor’s classification is inappropriate, does not necessarily imply that the employee in question is being underpaid. The question of remuneration is distinct from that of proper classification. Thus, in the normal course, the wage rate attributable to the classification would be determined only after the classification itself had been established to both the union’s and the employer’s satisfaction. The wage rate would then be subject to bargaining between the parties. In order to account for this process (which arises from the provisions of “old CECBA” and the case law of the Grievance Settlement Board), the parties, in their collective agreement expressly provided for the resolution of wage rate issues with respect to such newly created classifications by means of a process that concludes in a private interest arbitration process. Article 5.8 of the collective agreement provides as follows:

When a new classification is to be created or an existing classification is to be revised, at the request of either party the parties shall meet within thirty (30) days to negotiate the salary range for the new or revised classification, provided that should no agreement be reached between the parties, then the employer will set the salary range for the new or revised classification subject to the right of the parties to have the rate determined by arbitration.

8. The applicants agreed that there was a substantial backlog of cases such as theirs, and it is clear that some of the Berry orders, including those of the applicants, were outstanding for a considerable number of years. It appears that, until the events giving rise to the applications, the employer had not yet established class standards that were appropriate to the duties and responsibilities performed by any of the grievors. As a result the processes contemplated in Article 5.8 had commenced in any form.

9. The present applications arise out of an agreement reached between the trade union and the employer in December, 1994, to dispose of those outstanding classification grievances in which the *Berry* orders had been made, including those of the applicants. Earlier, during the “Social Contract” negotiations in the summer of 1993, the employer and the trade union had reached an agreement whereby the union would withdraw all outstanding classification grievances, with the exception of those with *Berry* orders, in exchange for various payments totalling \$40 million, half of which were to be distributed to the grievors involved, and the other half which was to be directed toward an “overhaul” of the classification system (with respect to this matter, see *David E. Smith*, [1995] OLRB Rep. June 893). After further negotiation, on December 6, 1994, it was agreed that the approximately thirty grievances in which there were outstanding *Berry* orders would be dealt with in a four-day, “marathon” mediation-arbitration session to be held on January 10 to 13, 1995 in Toronto. The parties agreed that, at that session, they would attempt to reach an agreement with respect to each of these matters and failing that, would proceed to mediation and ultimately arbitration before an arbitrator highly experienced in classification matters. It was agreed that neither party would retain counsel to present the grievances during the expedited process. Strict time limits were set for each stage of the procedure to permit the resolution in this fashion of each of the grievances in the four day period, and the parties agreed that none of the decisions of the arbitrator would be subject to judicial review.

10. Neither the trade union nor the employer sought the consent of the applicants to be included in such a process. The applicants, with one exception, which will be addressed below, were advised of the parties’ intention to proceed in this manner in early December, 1994 and were told to attend at the downtown Toronto hotel where the mediation-arbitration session was to be held. The applicants were also directed to bring with them documents relevant to the question of their classification. While it was made clear to them that representatives would be made available to them to present their cases, otherwise the trade union did not contact the applicants to begin in the preparation of their cases until they arrived at the sessions in Toronto.

11. It appears that some, if not all, of the applicants were dissatisfied at the outset of this process, and expressed this dissatisfaction to the trade union in no uncertain terms both prior to the commencement of proceedings and upon their arrival on January 10, 1995. Indeed, it appears that a substantial portion of the time designated for preparation at the sessions was consumed by discussions relating to the appropriateness of this process. The applicants were particularly displeased with the expedited format, which in their view would not allow for a full presentation of their duties and responsibilities, as well as with the union’s apparent intention to prepare for the presentation of their cases immediately prior to the mediation sessions. They complained to the trade union officials present that the representatives assigned to present their cases (who at the hearing they conceded were highly experienced in bargaining wage rates) were not sufficiently conversant with the details of their respective cases to present them properly. In one of the applications, it was asserted that the union representative had an empty file folder with respect to his grievance at the commencement of the session.

12. In response to their complaints raised at the session, trade union representatives advised the applicants that they had no choice with respect to the format in which the cases were to be heard and that, although the applicants were not compelled to be present, the mediation-arbitration of their cases would nevertheless take place were they to choose not to participate. The response of the various applicants ranged from reluctant participation in all aspects of the process to outright refusal to partake in any of its parts.

13. Indeed, the process continued in the absence of those applicants who had chosen not to participate and proceeded in a highly expedited fashion. For the most part, there was little actual negotiation before the commencement of the mediation processes. The mediations and arbitrations

before the arbitrator were conducted on the basis of agreed statements of fact. The applicants assert that the facts placed before the arbitrator were neither accurate nor comprehensive. As a result, they claim that the arbitrator's decision could not have been based on an full appreciation of the circumstances of their employment and that certain arguments of assistance to their case could not be raised. Similarly, it appears that in reaching a determination of an appropriate wage rate, in at least some of the cases before me no "proper" classification was actually agreed to or determined. Instead, other classifications, which clearly were not reflective of their actual duties and responsibilities, were used as proxies for the determination of the wage rate.

14. The actual results, of the process in practical terms, were varied. While some of the applicants achieved wage increases totalling nearly 14%, including retroactive payment for several years, others received no increases at all. The amount of increase obtained by the applicants does not appear to be reflective of their degree of participation in the mediation-arbitration process.

* * *

15. In essence, the trade union and the employer resolved the outstanding "Berry" grievances in an expedited manner that was specifically contemplated neither in the parties' collective agreement nor in the provisions of *CECBA*. The applicants assert that by agreeing to and executing this process of resolution of their grievances, both the union and employer have acted improperly and in breach of a wide range of obligations owed to them.

16. Under the statutory scheme set in place by the joint operation of the *Labour Relations Act* and the *Crown Employees Collective Bargaining Act, 1993*, the applicants' trade union is given the exclusive right to represent employees with respect to the terms and conditions of their employment. Section 69 of the Act, in turn, imposes upon the trade union what is often described as a "duty of fair representation" with respect to such employees. Section 69 provides as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

17. In the present applications, the applicants each make numerous submissions which, for the most part, were premised on the assumption that because the trade union had not fully honoured each of the rights they claim to possess under the terms of the collective agreement, the union constitution, and numerous statutes, *therefore* violates of section 69 of the Act. The applicants readily conceded that the litigation of each of their grievances in what, in their view, was an appropriate manner, would be enormously time-consuming and expensive. However, they insisted that it was the obligation of the trade union to vindicate their rights, regardless of the cost, and irrespective of the consequences that their pursuit might impose upon other members of the trade union.

18. Underlying this position is the fundamental assertion advanced by the applicants at the hearing that it is the individual grievor, rather than the trade union, that possesses "carriage rights" with respect to grievances, and that their trade union is not only obliged to advance a grievance to arbitration upon the request of the grievor, it is also required to provide legally-trained representatives for that purpose.

19. At this somewhat general level, there is nothing in any of the statutes cited by the applicants, in the Board's case law, nor in industrial relations policy to support the applicants' position. The Board has accepted that trade unions, rather than individual employees, normally control access to the grievance and arbitration processes. Otherwise, were the trade union required to pursue the interests of the individual employees in the manner proposed by the applicants, the enormous expenditure of time

and resources would prevent it from effectively advancing the interests of the collective and, more generally, would invite labour relations paralysis. In the course of its representative function, a trade union will often encounter circumstances where conflicting interests of those it is charged to represent can be satisfactorily reconciled only by virtue of compromise. In this respect, the joint administration of a collective agreement, unlike the operation of a contract in the commercial context, involves a relational aspect in which the importance of long term stability often overrides the imperatives of the strict enforcement of legal rights. The labour relations considerations entailed in locating carriage rights with the trade union, rather than the individual, were succinctly expressed in *Catherine Syme*, [1983] OLRB Rep. May 775:

20. Section 68 [now 69] requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.

21. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which (as in the present case) the parties seek to amicably resolve their differences. As in the ordinary civil litigation process, it may be in the interests of both parties to seek an "out of court" settlement which is more modest than either of them might have obtained had they been entirely successful before an adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation, and where it appears that the claim is without legal foundation or cannot be proved it makes little sense to proceed further.

22. These considerations are equally applicable to the settlement of disputes arising out of collective agreements. But there is an important difference. Unlike most parties in civil matters, the trade union employer are bound together in a relationship which will subsist so long as the employees continue to support the union and the employer remains in existence. That relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the ongoing relationship and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive bargaining relationship depends upon the development of a spirit of cooperation and compromise. Regardless of the arguable importance of any particular grievance, it will inevitably be only one of many which the parties will be required to resolve during the currency of their relationship; and, if either party obstinately adheres to an unreasonable position, or continually presses trivial claims, the entire settlement process could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials are required to spend needless hours discussing inconsequential or unfounded grievances. As a practical matter, a rigid insistence on one's "strict legal rights" or an insistence on proceeding to arbitration with doubtful claims is likely to provoke a response in kind, and yield only short term gains. As a matter of good judgement, and in the interest of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. I do not think there is any justification for processing obviously groundless claims simply because an individual employee demands his "day in court". Such position not only represents a waste of the employees' money in counsel and other fees associated with the arbitration process, but could also prejudice the ongoing and informal resolution of disputes, short of arbitration, where there might well be some contractual basis for the union's claim.

20. Bearing these considerations in mind, labour relation boards and courts have accepted that it is within the trade union's discretion to settle or otherwise dispose of grievances, even if they appear to be meritorious, provided that reasonable consideration is given to the substantial labour relations

interests involved (see, particularly, *Centre Hospitalier Regina Ltee. v. Labour Court* 90 CLLC par. 12.157 (S.C.C.)).

21. Absent some very specific statutory direction or collective agreement requirement to the contrary, there is no reason for the Board to conclude differently with respect to the relationship of OPSEU and the employees it represents in the Ontario Public Service. For that reason, the Board cannot accept the applicant's bald assertion that they possess the right to determine the disposition of their grievances because OPSEU is somehow "different" and "unique". The Board has already had an opportunity to comment on this matter. In *David E. Smith v. OPSEU*, *supra*, the applicant claimed that the union had breached its duty of fair representation under the predecessor legislation ("old CECBA") by settling his classification grievance without his consent. Although the application was dismissed on grounds not pertinent to the present applications, the Board nonetheless rejected the applicant's contention that, under the provisions of the "old CECBA", there was a statutory impediment to the union settling his grievance without his consent. I am in respectful agreement with the reasoning in that decision insofar as it relates to the previous statutory provisions, and with the substantial case law from the Grievance Settlement Board that was relied upon to support that finding. Further, I see no reason why the result should be different under the current legislation. Indeed, I note that sections 18 and 19 of the "old CECBA", which were advanced to support the applicant's argument in the *Smith* case, have no correlate in the current legislation and to that extent, the present applicants' claim to individual carriage rights is, if anything, even weaker. Accordingly, I reject the applicants' argument that there is a contractual or statutory basis to an individual "carriage right" within CECBA.

22. Furthermore, the applicants are not able to find support for their position before the Board in the provisions of the OPSEU constitution. Much was made by the applicants that, in their view, the trade union had in various respects violated its constitution in acting as it did, and in that regard, the very agreement to process the grievances in the mediation-arbitration system was therefore "null and void". However, even assuming that the trade union acted contrary to the provisions of its constitution (and the Board declines to comment on whether that is indeed the case), that does not, in itself, establish that it has acted arbitrarily within the meaning of section 69 of the Act. The statutory provision is intended to regulate the nature and quality of the representation provided by trade unions on behalf of employees *vis-a-vis* the employer, and is not aimed at the supervision of the obligations established by internal constitutional documents. In other words, the Board is concerned whether the representation that the employees actually received meets the standard established by the statute; the supervision of rights and obligations that have been established by union constitution is a matter dealt with in other forums. (See for example, *Local Union 46 of the United Association of Plumbers, Steamfitters, and Apprentices*, Board File No. 2651-94-U, October 27, 1994, unreported, *Frank Manoni*, [1983] OLRB Rep. Aug. 1344.)

23. Finally, none of the other rights purportedly held by the applicants are such as to preclude the trade union from exercising its discretion to dispose of the grievances through the mediation-arbitration process without the applicants' consent. Little purpose would be served in recounting the applicants' numerous arguments in detail. I have considered each of them and they are entirely without merit. It is sufficient to note that the fact that the Grievance Settlement Board was "seized" of the grievances filed on behalf of the applicants does not substantially affect the trade union's ability to settle, withdraw or otherwise dispose of such grievances other than through the formal process of litigation that the applicants appear to expect. It certainly does not compel the trade union to continue the litigation of each of the numerous outstanding issues in the grievance at the behest of the applicants. In that respect, there is no basis for the applicants' alleged "right of return to the Grievance Settlement Board" nor, more generally, for them to insist upon a quasi-judicial determination of their classification and salary levels.

24. Accordingly, I am not persuaded that the trade union was in breach of its fair representation obligations because it disposed of the applicants' grievance contrary to their express wishes.

* * *

25. Did the trade union nevertheless act in an arbitrary or discriminatory manner in processing the applicants' grievances in an expedited manner? That is to say, does the material filed by the applicants disclose that the trade union, in exercising its discretion to place the grievances into a mediation-arbitration process, failed to consider the interests at stake in the matter, or that their decision-making in respect to the decision was unreasonable or capricious? (See *Walker Exhaust Limited*, [1979] OLRB Rep. Feb. 144; *David E. Smith*, *supra*.)

26. Insofar as the union's decision to dispose of the remaining *Berry* grievances by means of the mediation-arbitration mechanism is impugned, there is nothing to suggest that the process is inherently inappropriate or that it is unsuitable to the resolution of the remaining issues. Indeed, the opposite appears to be the case. In recent years, parties to collective agreements in Ontario have increasingly resorted to various forms of mediation and expedited arbitration processes to resolve employees' grievances. Concerned about substantial costs and frequent delays encountered in the arbitration process, trade unions and employers have utilized various "alternative dispute resolution" mechanisms to deal with disputes at the workplace. Generally speaking, these processes operate in an expedited manner and without the formalities entailed in the calling of evidence, the making of legal submissions and the writing of detailed reasons. The experience has been that disputes are resolved to the parties' mutual satisfaction in an expeditious and cost-effective manner. Indeed, without the legalisms often constraining the litigation process, a mediated resolution of a dispute frequently deals more realistically with the substantive issues underlying the conflict.

27. Of course, not every collective bargaining dispute is equally amenable to a mediated or expedited settlement, and it may be that in some grievances, a formal hearing might be necessary for its meaningful resolution. Without venturing into the question of what such grievances might be, it is difficult to conclude that the issues outstanding in the grievances giving rise to the present applications could not be properly dealt with in the manner agreed upon by the parties. Given that the outstanding issues were essentially remedial in nature, and that questions of credibility of witnesses would be unlikely to directly affect their resolution, the value of a fully adversarial legal proceeding is questionable from a legal process standpoint. More fundamentally, however, it is important to remember that the real labour relations issue arising in the outstanding grievances, namely, the attribution of wage rates to a given set of job functions, is the everyday stuff of collective agreement negotiation between employers and trade unions. Except in those instances where "interest arbitration" is utilised, such matters are routinely bargained without recourse to the legal mechanisms associated with a hearing. With this in mind, the highly legalized process in which the current grievors were engaged prior to the impugned agreement must be considered as anomalous, and the parties' departure from it into a form of resolution more approximating a negotiated agreement cannot be construed as inconsistent with collective bargaining norms in Ontario. By contrast, if the applicants' own experience is to serve as an example, the "conventional" litigation of classification grievances does little to commend itself in labour relations terms. The grievances were filed many years ago, and the cost of the extensive litigation to date, even the applicants agreed, has been enormous. Finally, it must not be forgotten that to date, many years after the commencement of the litigation process, only a relatively small portion of the issue had in fact been determined.

28. Faced with the prospect of continuing in this manner, the application materials disclose that the trade union determined that the costs of proceeding by way of conventional litigation of the outstanding classification matters outweighed the benefits that could be derived from such a process,

and chose the mediation-arbitration route as an alternative. Nothing that the applicants present to me persuades me that their interests were not adequately taken into account by the trade union. (See *Leonard A. Vaillant* [1994] OLRB Rep. Nov. 1596) The process provided the opportunity for each of the grievors to provide significant input - but not instruction or direction - as to how their case was to be presented and resolved. Indeed, there was little or nothing that demonstrated that their interests were substantially prejudiced by virtue of the trade union's decision to expedite their grievances.

* * *

29. Moreover, there appears to be nothing in the union's conduct in the mediation-arbitration process that would give rise to concern by the Board. In its cases, the Board has made it clear that a trade union is not obliged to provide to grievors representation by legally-trained counsel and that it would be inappropriate for it to second guess the exercise of judgement by representatives in the course of presenting a case. (See, e.g. *Cryovac*, [1983] OLRB Rep. June 886) Only in instances where the conduct by the representative is so flagrant, reckless or capricious that it could be classified as arbitrary would the Board intervene. Nothing in the materials filed by the applicants raises an allegation of this sort. The applicants conceded at the hearing that the representatives assigned to them were highly experienced in bargaining wage rates. (Indeed, the applicants formally apologized for certain statements previously made by them implying the contrary.) At its highest, the applicants contend that they disagreed with certain decisions made by the various representatives in the course of their presentations. As noted, however, that does not amount to a violation of the Act.

30. It is true that one of the applicants, through an apparent oversight, was advised of the "med-arb" session only shortly before it was to commence, and suffered considerable inconvenience as a result. Nevertheless, although much was made of his purported inability to prepare himself properly for the session, nothing specific was advanced as to what actual prejudice he incurred, or precisely what kind of preparation would be useful given the mediation-arbitration format. Clearly, the applicants had in mind the kind of painstaking preparation necessary to engage in the process of conventional litigation, in which counsel was to be instructed, and testimony prepared so as to be able to successfully run the gauntlet of cross-examination. Nothing of the sort was necessary given the mediation-arbitration format in which the matters were to be resolved. Indeed, the avoidance of this process was the one of the very real benefits of engaging in the mediation-arbitration process.

31. The applicants' further contentions that their representatives were not sufficiently familiar with their cases to present them properly and that the process itself did not allow for a full airing of their disputes must be considered in this context as well. Although the applicants concede that they were given the opportunity to instruct their representatives prior to the commencement of the mediation process, they assert that the failure of the representatives to prepare their individual cases ahead of time was deeply prejudicial to their cases. Once again, however, it is clear that the applicants' assessment of the appropriateness of the preparation is based entirely on their previous experience in the litigation process, and nothing in the materials pleaded by them suggests that sufficient preparation time for the substantially less formal mediation arbitration process was not accorded.

32. Finally, each of the applicants complains of the abbreviated consideration of their cases by the arbitrator. No doubt, after having experienced what was, cumulatively, decades of "conventional" litigation before the Grievance Settlement Board, the prospect of having their cases determined in a four day period was breathtaking. Nevertheless, once the applicants' assertions of fact are reviewed (as distinct from their characterization of them), I am satisfied that the process provided them a substantial opportunity to have their cases considered and an opportunity for them to be meaningfully resolved.

33. Accordingly, I am satisfied that, even if the applicants' facts are accepted as provable, they do not support the assertion that the trade union acted in an arbitrary manner. Therefore bearing in mind

all of the circumstances, I am satisfied that the applicants have made out no case for a violation of section 69 of the Act.

* * *

34. As noted above, the applicants also alleged that the employer and the trade union violated other sections of the Act, including sections 67, 70 and 71. Although the applicants at the hearing persisted in maintaining these serious allegations, there is simply no factual basis pleaded in support of them. Accordingly, I also find that they have not made out a case with respect to those allegations.

35. Finally, Mr. McLaughlin, in OLRB File No. 3463-94-U, has alleged that the trade union is in violation of section 30 of the *Crown Employees Collective Bargaining Act* R.S.O. 1990, c. 38, i.e. "old *CECBA*" It is sufficient to note with respect to this application that the statutory provision was repealed by the time of the events giving rise to the present application and that in any event, the Board did not have and does not now have jurisdiction to adjudicate over matters arising under "old *CECBA*" (*David E. Smith, supra.*) Therefore, this application is dismissed as well.

* * *

36. With the exception of the application in Board File No. 3463-94-U, then, I have concluded that the applicants have not made out a case for which the Board would grant a remedy, even if all the assertions of fact contained in their applications were to be taken to be provable and true. Accordingly, pursuant to my discretion under section 91 of the Act, and in accordance with Rule 24 of the Board's Rules of Procedure, I decline to inquire further into these applications and to hold a hearing into the allegations set out therein. In the case of the application set out in Board File No. 3463-94-U, I have concluded that the Board has no jurisdiction to hear the matter.

37. Therefore, these applications are dismissed.

0388-96-U International Association of Machinists and Aerospace Workers, Local Lodge 1922, Applicant v. Orenda Aerospace Corporation, Responding Party

Duty to Bargaining in Good Faith - Practice and Procedure - Unfair Labour Practice - Board exercising its discretion not to inquire into union's unfair labour practice complaint where existence of arguable case far from clear and where litigating the matter would do nothing to further the parties' collective bargaining or their labour relations in general

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *O. R. McGuire* and *H. Peacock*.

APPEARANCES: *M. Lewis* and *Brian Short* for the applicant; *Martin Addario* and *Kirsten Ramage* for the responding party.

DECISION OF THE BOARD; June 10, 1996

1. This is a complaint under section 96 of the *Labour Relations Act, 1995* in which the applicant trade union alleges that the responding employer has violated sections 17, 45, 48, 56, 60, 70, and 72 of the Act.

2. A hearing was convened on May 30, 1996.

3. In its pleadings, the responding employer states that its correct name is "Orenda Aerospace Corporation", that on the date this application was made it was "Hawker Siddeley Canada Inc., Orenda Division" but that on May 7, 1996, that company was sold and is now a wholly owned subsidiary of Fleet Aerospace Corporation known as "Orenda Aerospace Corporation", agrees with the applicant trade union's assertion that it represents the office and technical employees of the responding employer at its Derry Road, Mississauga facility, and states that the parties have had a collective bargaining relationship "since at least 1950."

4. Accordingly, and having regard also to what was said at the hearing, the Board declares that there has been a sale of business within the meaning of section 69 of the Act by Hawker Siddeley Canada Inc., Orenda Division to Orenda Aerospace Corporation. The Board further declares that the applicant trade union holds bargaining rights for the same office and technical employees at the Derry Road, Mississauga facility now as it did before the sale, and that the notice to bargain given by the applicant trade union to Hawker Siddeley Canada Inc., Orenda Division has the same effect as if it was given to Orenda Aerospace Corporation.

5. The name of the responding employer is therefore amended to "Orenda Aerospace Corporation."

6. Upon considering the materials filed, and the representations of the parties at the hearing, the Board ruled, orally, that it considered it appropriate to exercise its discretion, under section 96 of the Act, not to inquire further into the complaint.

7. In that respect, it appeared to the Board that even if the applicant had made out an arguable case, and even if the relief the trade union sought was arguably appropriate, something which was far from clear, litigating the matter would do nothing to further either the collective bargaining in which the parties are engaged, or their labour relations in general. On the contrary, it appeared more likely that litigating the complaint would only get in the way of collective bargaining. At the very least, it would have caused further delay in that respect and inhibited useful collective bargaining in circumstances in which everyone agreed the bargaining table is where the parties should be. The Board considered it inappropriate to inject itself into collective bargaining between the parties, which would have been the effect of allowing this complaint to proceed. Accordingly, the Board exercises its discretion not to do so as aforesaid.

8. In an attempt to offer some guidance to the parties, and to demonstrate to them that at least some of their differences are perhaps more semantic than real, the Board observed as follows:

- (a) although bargaining the scope of bargaining rights is permissible, no party can bargain scope issues to impasse;
- (b) whether or not an employer's request or insistence that a trade union take a collective bargaining proposal to a vote of the bargaining unit employees constitutes a violation of the *Labour Relations Act, 1995* will depend on the circumstances.

9. At the very least there is some question of the continued applicability of the Board's pre-Bill 7 jurisprudence in that respect. Nevertheless, the parties to collective bargaining are the employer and the trade union (the latter as the exclusive bargaining agent of the bargaining unit employees) and ratification remains primarily an internal trade union matter, until bargaining has reached the point at which section 44 of the Act applies (or section 42 is invoked by the employer).

3308-95-R; 3395-95-R United Steelworkers of America, Applicant v. Sara Lee Bakery Canada., Responding Party

Certification - Practice and Procedure - Reconsideration - Union withdrawing first certification application after receiving response from employer listing seven office staff on list of employees and after employer opposing union's request to amend its application by excluding office and clerical staff from proposed bargaining unit - Board granting union leave to withdraw without a bar - Union filing second application and proposing bargaining unit excluding office and clerical staff - Employer objecting - Board directing representation vote - Employer applying for reconsideration of decision permitting union to withdraw first application without a bar - Board rejecting employer's submission that Bill 7 amendments to Act imposing mandatory, rather than discretionary, bar following withdrawn applications - Board noting that inconvenience of employer in responding to certification application that is subsequently withdrawn not amounting to prejudice and not justifying imposition of bar - Board also recognizing that subsequent certification application may be based on information union had gained from first withdrawn application, but seeing nothing improper in this - In circumstances where wishes of employees not tested with certainty and union is not abusing Board's process, Board identifying no need to impose bar - Reconsideration application dismissed - Certificate issuing

BEFORE: *M. Kaye Joachim*, Vice-Chair, and Board Members *J. A. Ronson* and *P. R. Seville*.

APPEARANCES: *Mark Rowlinson* for the applicant; *Bonnie Oldham* and *Jason Hanson* for the responding party.

DECISION OF THE BOARD; May 14, 1996

1. This is an application for reconsideration in Board File No. 3308-95-R and an application for certification in Board File No. 3395-95-R, which were heard together on January 16, 1996. At the conclusion of the hearing, the Board made the following bottom-line oral rulings:
 - i) The Board declines to reconsider its decision not to impose a bar on the applicant following withdrawal of its certification application in Board File No. 3308-95-R; accordingly, there is no bar to the applicant's filing of the second application for certification in Board File No. 3395-95-R.
 - ii) A certificate will issue to the applicant in Board File No. 3395-95-R.
2. These are the reasons for our decision.
3. On December 4, 1995 the applicant (also referred to as the "union") filed an application for certification of the employees of the responding employer (Board File No. 3308-95-R). The bargaining unit was described in the application as follows:

all employees of the responding party in the City of Brampton save and except managers, persons above the rank of manager.
4. The union's application indicated that there were six employees in the described bargaining unit.
5. On December 6, 1995, the responding party (also referred to as the "employer") filed its response to the application, agreeing to the union's bargaining unit description, but noting that there were nineteen individuals in that unit. The responding party noted that there were seven employees in

its outlet store and twelve office employees. The employer asserted that the applicant did not have the requisite support of forty per cent of the employees in the bargaining unit to obtain a vote and asked that the application be dismissed.

6. By letter dated December 7, 1995, the union requested leave to amend its application to narrow the bargaining unit description to the six individuals identified in its application. The amended bargaining unit description was as follows:

All employees of the Responding Party in the City of Brampton save and except managers, persons above the rank of manager, *office and clerical staff*. (emphasis added)

7. The union indicated that the reason it had applied for the all employee unit was because of its mistaken belief that there were only six employees employed by the responding employer. The union believed that the other individuals were employed by a different employer. It was only upon receipt of the employer's response that the union learned that there were nineteen employees employed by the responding employer.

8. The employer opposed the union's request to amend its application and submitted that the original application should be dismissed. In the alternative, the request to amend should be treated as a request to withdraw the application, in which case the employer requested that the applicant be barred for one year from reapplying.

9. The union responded reiterating its request to amend its application, or in the alternative, requesting leave to withdraw, without a bar.

10. By decision dated December 9, 1995, the Board granted the applicant leave to withdraw its application, without imposing a bar. The responding party filed this request for reconsideration, reiterating its request that the Board impose a bar.

11. On December 12, 1995, the union filed a second application for certification (Board File No. 3395-95-R) in respect of some of the employees of the responding party. The bargaining unit was described in the application as follows:

all employees of the Responding Party employed at its retail outlet store in the City of Brampton, save and except Managers and persons above the rank of Manager.

For the purposes of clarity, the above-described unit does not include employees covered by a subsisting collective agreement, professional and technical employees, engineers, draftsmen, office and sales staff.

12. By decision dated December 18, 1995, a different panel of the Board directed a representation vote in Board File No. 3395-95-R, which was held on December 19, 1995.

13. The Board held a hearing on January 16, 1995, for the purpose of hearing representations on the reconsideration request. In light of the extremely tight time frames involved in certification applications, and the fact that neither party had the opportunity during that process to make full submissions on the issue of the bar, the Board has not applied its usual standard on reconsideration applications. Rather, the Board has considered the parties' submissions on the issue of the bar on the merits.

Board File No. 3308-95-R

Employer's arguments

14. The employer argued that section 7(9) of the *Labour Relations Act, 1995* ("the Act") provides for a mandatory lapse of time between the withdrawal of the application and the submission of a new application for certification. Section 7(9) states:

7.(9) If the trade union withdraws the application before a representation vote is taken, the Board may refuse to consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit until one year or such shorter period as the Board considers appropriate has elapsed after the application is withdrawn.

15. The employer argued that the only discretion provided to the Board in section 7(9) is to shorten the bar from the one year standard, should the Board consider it appropriate. The employer argued that the Board has no authority to waive the bar in its entirety.

16. The employer noted that automatic one year bars are imposed in section 7(10), 10(3) and 160(3), in order to ensure consistency throughout the Act. The employer argued that it would be contrary to the intention of the Act if the union could avoid the imposition of a bar by requesting leave to withdraw.

17. The employer noted that under section 105(2)(i) of the *Labour Relations Act*, R.S.O. 1990 c.L.2 ("the old Act") the Board had a discretion to decide whether or not to impose a bar, as well as a discretion with respect to the length of the bar:

Section 105(2) Without limiting the generality of subsection (1), the Board has the power,

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.

18. The employer argued that the Legislature did not adopt similar language in section 7(9) and therefore the mandatory nature of the bar in section 7(9) can be inferred from the change in language.

19. The employer further argued that its interpretation of the mandatory nature of the bar in section 7(9) is supported by the scheme of the Act with the respect to certification. The Act contemplates that certification votes will be held in five days. To permit the applicant to withdraw in this case and then reapply, would result in a delay in the timing of the vote. In this case, the original certification application was filed on December 4, 1995, triggering a vote on the fifth day, December 9, 1995. Instead, as a result of the Board's decision of December 9, 1995 permitting the applicant to withdraw, the applicant filed a subsequent certification application on December 12, 1995, resulting in a vote on December 19, 1995. Thus, the employer argued, to permit the applicant to withdraw without a bar, runs counter to the requirement in the Act for a five day vote.

20. The employer asserted that in this case, the union's request to withdraw gives rise to the inference that the union was seeking to avoid an unfavourable result in the vote. The employer argued that even under the old Act, the Board would impose a bar on a union that withdrew a certification application for the purpose of avoiding an unfavourable result in a vote. The employer suggested that the facts as set out in the correspondence between the parties suggests that the union was attempting to obtain an all employee unit, when it only had the support of the retail workers. Upon receiving the employer's response and recognizing that the number of non-retail employees made it impossible to win a vote, the union sought to avoid the unfavourable result of the vote by seeking to amend its application, or alternatively, to withdraw it.

21. The employer suggested that, where the union asserts that it has made a mistake, causing it to seek to amend or withdraw an application, the onus is on the union to present evidence to prove the innocent mistake. It is not sufficient to assert that a mistake was made.

22. The employer argued that in this case it was appropriate for the Board to impose a bar for one year. The employer argued that the one year bar should be viewed as the standard length of bar, in keeping with the mandatory one year bar set out in sections 7(10), 10(3) and 160(3) of the Act. Only in extraordinary circumstances should the bar be reduced. The union did not assert any circumstances which would justify shortening the bar in this case.

Union's Arguments

23. The union argued that the word "may" in section 7(9) gives the Board a discretion to decide whether or not to impose a bar, as well as a discretion on the length of the bar. The union noted that if the Legislature had intended that the bar be mandatory, but that only the length of the bar be discretionary, it could have used the word "shall" in section 7(9).

24. The union noted that the wording of section 7(9) changed during the passage of the Bill. Originally, Bill 7 provided:

7(9) The Board shall not consider another application for certification by the trade union as the bargaining agent of the employees in the bargaining unit until one year has elapsed after the application is withdrawn.

25. The version which found its way into the Act is currently set out in section 7(9). The union argued that this legislative history makes clear that the Legislature did not intend section 7(9) to be mandatory.

26. The union argued that the Board should not exercise its discretion to bar the union for any period from reapplying with respect to the employees in the bargaining unit. On the facts of this case, the request to withdraw was made after receipt of the employer's response, but before the vote was ordered and before the list of employees was shared with the union.

27. The union argued that no labour relations purpose would be served in this case by barring the union from reapplying. The sole effect of a bar would be to thwart the wishes of the employees with respect to collective bargaining from being recognized.

28. The union noted that the case law under previous versions of the Act is still relevant, at least with respect to section 7(9). The union argued that there were two circumstances which caused the Board to exercise its discretion to impose a bar following an unsuccessful certification application. First, the Board imposed a bar when the wishes of the employees had been ascertained by means of a vote and the employees indicated a wish not to be represented by the applicant. As a subset of this circumstance, the Board also imposed a bar where the union sought to withdraw its application for the purpose of avoiding an unfavourable result at the vote. The purpose of the bar was to permit a period of repose, following the ascertaining of the wishes of the employees. The key, the union argued, to the exercise of the Board's discretion, was that the Board was satisfied that the wishes of the employees had been ascertained. Second, where an applicant union makes repeated, unsuccessful applications within a short period of time, the Board imposed a bar to prevent an abuse of its processes. This summary of the Board's traditional exercise of its discretion is found in *Amarcord Carpenters Ltd.* [1989] OLRB Rep. June 531 at paragraph 5:

5. Under clause 103(2)(i) of the Act, the Board has the power

to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees within any

period not exceeding ten months from the date of the dismissal of the unsuccessful application.

The Board's approach to the exercise of its powers under this clause was described in general terms in *Repac Construction and Material Limited*, [1978] OLRB Rep. Jan. 91, at paragraph 7:

As a general principle the Board is quite reluctant to either bar, or refuse to entertain, a subsequent application for certification filed by a previously unsuccessful applicant. Indeed, such action is usually only taken either where employee desires have been tested by a representation vote in which the union failed to receive sufficient support to be certified (See: *Campbell Soup Company Ltd.*, 1976) OLRB Rep. Feb. 1091), or where the union has sought to avoid an unfavourable vote result by withdrawing its application following the ordering of such a vote. (See: *Mathias Ouellette* 56 CLLC ¶118,026). Exceptional circumstances may, however, also lead to the Board invoking the provisions of section 92(2)(i) in other situations. The leading example of this is the *J.W. Crooks Company* case, [1972] OLRB Rep. Feb. 126, where "in light of the special and extreme circumstances confronting the Board", namely four unsuccessful applications for certification made by the same applicant in a little over three months, the Board imposed a six month bar on any future applications by the same applicant. In its consideration of any request pursuant to section 92(2)(i), the Board, concerned that the wishes of employees be given effect to, has always been careful not to use its authority under that section merely to punish an unsuccessful applicant union, even in those instances where the union may have engaged in previous irregular or improper conduct. (See *Fruehauf Trailer Company of Canada Limited* [1974] OLRB Rep. Jan. 6.).

The rationale for imposing a bar was explained this way in *General Freezer Limited*, 63 CLLC ¶16,294:

A bar to future applications for certification is usually imposed following a dismissal after a representation vote is taken, due to the fact that in such cases, all of the employees in the bargaining unit have had the opportunity to express their wishes with respect to their choice of a bargaining agent by means of a secret ballot, and therefore the true wishes of the employees have been fully tested. It is not the Board's usual practice to impose a bar to future applications for certification where an applicant fails to submit sufficient evidence of membership to entitle it to a representation vote where there is no incumbent bargaining agent. The success of an applicant union's organization campaign is dependent on many factors and its failure to acquire sufficient membership has not the same evidentiary value with respect to the wishes of the employees as a representation vote.

29. See also, *R.J.R. MacDonald Inc.* [1992] OLRB Rep. April 503 at paragraphs 13 to 15.

13. The purpose of the *Labour Relations Act* is to encourage the practice and procedure of collective bargaining. That purpose is set out in the Preamble to the Act, and is reflected, *inter alia*, in section 3 which guarantees employees the right to join a trade union and participate in its lawful activities. Certification is the mechanism whereby a union can become established as the employees' bargaining agent if that is the wish of the majority of them. Where there is no subsisting collective bargaining relationship, an application for certification can generally be made at any time (see section 5 of the Act).

14. Section 105(2)(i) envisages the possibility of a temporary bar to the exercise of these statutory rights where an applicant has been unsuccessful and the Board, in its discretion, considers such bar to be appropriate. However, the Board has not normally exercised its discretion to impose a bar unless the employees have had the opportunity to express their wishes in a Board-supervised representation vote, or there have been several unsuccessful applications in rapid succession. (See generally: *Repac Construction and Material Limited*, [1978] OLRB Rep. Jan. 91; *Sonora Cosmetics Inc.*, [1982] OLRB Rep. June 954; *Amarcord Carpenters Ltd.* [1989] OLRB Rep. June 531; *Southern Express Lines of Ontario Ltd.*, [1988] OLRB Rep. Oct. 1107; and *Mor-Alise Construction Ltd.*, [1977] OLRB Rep. Oct. 668).

15. Section 105(2)(i) requires the Board to balance the rights of employees to form or join a trade union and the interests of employers (or objectors) to have that matter settled as simply and expeditiously as possible. That is why the Board will almost always impose a bar after a decisive testing of employee wishes in a secret ballot vote, or if there has been a series of unsuccessful applications which have been cumulatively disruptive. In either case, orderly labour relations demands a period of repose. But the Board has been careful not to use its discretion under section 105(2)(i) to unduly circumscribe employee rights or "punish" an unsuccessful applicant - especially when such applicant will seldom have complete information about an employer's organization, and no means of acquiring that information apart from the application itself. In that context, it is difficult to ascribe "fault" for the way in which a proceeding develops - even though the employer will inevitably be put to some inconvenience responding to its employees' efforts to organize themselves. In the instant case, for example, some expense and delay are attributable to the bargaining unit dispute which was ultimately resolved in the union's favour; but it would be wrong to ascribe "fault" to any of the parties for pursuing this question.

30. The union argued that the provisions of the Act mirror, to a great extent, the Board's previous jurisprudence on the issue of a bar following an unsuccessful certification application. Sections 7(10) and 10(3) provide for the mandatory imposition of a bar upon the withdrawal of the application after the taking of the vote, or upon an unsuccessful representation vote. Accordingly, the Board should not hesitate to apply its traditional tests in exercising the discretion remaining to it under section 7(9) of the Act.

31. The union proposed a simple test for the exercise of the Board's discretion under section 7(9). Where the representation vote has not been taken, the Board should not exercise its discretion to impose a bar, except in the limited circumstances where an applicant is seeking to avoid the results of an unfavourable vote, or in the case of repeated, unsuccessful applications within a relatively short period of time.

The Decision

32. The Act contemplates a new scheme for the establishment of collective bargaining rights. One of the stated purposes of the new Act is set out in section 2 of the Act:

2. The following are the purposes of the Act:

1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.

33. Sections 7 to 15 set out the basic scheme of the Act with respect to the establishment of collective bargaining rights. The Act contemplates that the wishes of the employees of the employer will in the usual case be tested by a secret vote to determine whether or not the employees wish to be represented by the applicant trade union in their employment relations with their employer. The vote will generally be held within five days, unless the Board directs otherwise. Where a majority of the employees voting express a desire to be represented by the applicant, the trade union shall be certified to represent them. Where a majority of the employees voting express a desire not to be represented by the applicant, the Act contemplates a period of repose of one year, following the unsuccessful certification application, during which time the applicant is barred from pursuing a further certification application with respect to the employees in the bargaining unit.

34. The predominate shift in focus under the new Act has been with respect to the manner in which bargaining rights can be obtained. Under the Act, a trade union can primarily obtain bargaining rights through the mechanism of a vote. The Act emphasizes the importance of ascertaining the wishes of the employees through the mechanism of a vote.

35. Against this backdrop, the Board considers the interpretation of section 7(9) of the Act. In our view, section 7(9) gives the Board a dual discretion. The Board has the discretion to determine whether or not to impose a bar following the withdrawal of a certification application before a vote is taken. In addition, the Board has the discretion to determine length of the bar, up to a period of one year. The use of the word “may” in section 7(9) indicates that both the imposition of a bar, and the length of any such bar are matters of the Board’s discretion.

36. The *Interpretation Act*, R.S.O. 1990, c. I.11, s. 29(2) states:

In the English version of an Act, the word “shall” shall be construed as imperative and the word “may” as permissive.

37. It is a basic principle of statutory interpretation that the use of the word “may” rather than “shall”, indicates that the power conferred is discretionary, rather than mandatory:

Expressions such as “The Board has the power to ...” or “The Commission may ...” by their very wording grant powers whose exercise is optional. The permissive character of the word “may” is confirmed in the Interpretation Acts. (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville: Les Editions Yvon Blais Inc., 1991) at 199.

38. Had the Legislature intended the imposition of the bar to be mandatory, and only the length of the bar to be discretionary, the use of the word “shall” in place of the word “may” in section 7(9) would have accomplished that end. In our view, the choice of the word “may” clearly indicates the Legislature’s intention to grant the Board the dual discretion referred to above.

39. Section 7(9) must be contrasted with the other sections of the Act dealing with the imposition of a bar. Sections 10(3) and 160(3) contemplate the imposition of a bar for a period of one year upon the dismissal of a certification application after an unsuccessful vote. Section 10(3) relates to industrial certification applications; section 160(3) relates to the construction certification applications. Section 7(10) and section 160(3) contemplate the imposition of a bar for a period of one year upon the *withdrawal* of a certification application *after the representation vote is taken*. Those sections mandate the imposition of a bar and the length of the bar, through the use of the word “shall”. Section 7(9), by contrast, contemplates the dual discretion described above, through the use of the word “may”.

40. In our view, the permissive nature of the word “may” in section 7(9) conforms to the object or purpose of the new Act.

41. As stated earlier, the Act contemplates that bargaining rights can be acquired primarily by obtaining the support of the majority of the employees voting. The Act also contemplates a period of repose, following the testing of the wishes of the employees in the bargaining unit by means of a vote. The focus of the bar provisions is on whether the wishes of the employees have been tested by means of a representation vote. It is only *after* the wishes of the employees have been tested by means of a representation vote, that a bar of one year will be imposed. In our view, this reinforces our view that section 7(9) gives the Board a discretion whether or not to impose a bar, *before* a vote is taken. Subject to our comments below, prior to the taking of the vote, the wishes of the employees have not been tested with sufficient certainty to justify the imposition of a bar against a further application by the applicant trade union.

42. The legislative scheme of the Act with respect to the imposition of a bar in certification application cases does not deviate significantly from the the Board’s approach to that issue under the previous Act. In the past, the Board had a discretion to decide whether or not to impose a bar and the length of bar, following an unsuccessful certification application. The Board’s approach in the past was twofold. The Board generally imposed a bar following an unsuccessful representation vote. This

approach has now been codified in section 10(3) of the Act. In keeping with that approach, the Board also imposed a bar where the trade union sought to withdraw its application for the purpose of avoiding an unfavourable result at the vote. In those cases, the certification process had advanced sufficiently so that the Board was satisfied that the wishes of the employees were clear. The focus of the Board's inquiry was whether the wishes of the employees to be represented by the applicant trade union had been clearly tested. Section 7(10) may be seen as a codification of that approach. Where the representation vote has been taken, a withdrawal by the applicant will still trigger the one year bar. Finally, in the past, the Board has imposed a bar where the applicant trade union made repeated, unsuccessful certification applications in a short period of time. Again, the focus of the Board was on the wishes of the employees, which had been tested with some degree of certainty through the mechanism of repeated, unsuccessful applications. The purpose of the bar, the Board has stated, is to foster orderly labour relations by means of a period of repose, after the wishes of the employees have been tested. (See *Amarcord Carpenters Ltd.*, and *R.J.R. MacDonald Inc.*, *supra*).

43. The Board's jurisprudence is still useful in guiding the Board in the exercise of the discretion in section 7(9) of the Act. In our view, the Act contemplates that the focus of our inquiry should be on whether the wishes of the employees on the issue of representation by the applicant have been tested with sufficient certainty so as to give rise to the need for a period of repose on that issue. The Board must also be satisfied that the union is not abusing the Board process by, for example, making repeated applications.

44. On the facts of this case, we are satisfied that the wishes of the employees have not been tested at all, in Board File No. 3308-95-R, nor has the union engaged in actions which constitute an abuse of process and therefore, can see no basis for the exercise of our discretion to impose a bar of any length.

45. We reject the employer's argument that the Board should embark upon an inquiry into an applicant's request to withdraw its application. In this case, the request to withdraw was made after receipt of the employer's response to the certification application, and prior to an order of the Board directing a vote. In those circumstances, the Board sees no need to inquire into the reasons for the request to withdraw. The Board makes no findings with respect to the applicant's reasons for withdrawing in this case.

46. It may often be the case that the applicant trade union will discover information from the employer's response that will cause it to withdraw its application. A trade union's ability to obtain accurate information about the identity of the employer, the configuration of the workplace, the number of employees, and other matters which may be relevant to the certification application, is limited. The employer's response to the certification application may provide new information to the applicant to cause it to reconsider the advisability of pursuing the application. Although an employer may suffer inconvenience in responding to a certification application which is subsequently withdrawn, the employer suffers no prejudice in the withdrawal of a certification application prior to the taking of a vote, and the subsequent refile of a new application. We recognize that the subsequent application may be based upon information the union has gained from the first application but we see nothing improper in this.

47. The Board grants leave to the applicant to withdraw its application in Board File 3308-95-R. The Board declines to impose a bar on the applicant pursuant to section 7(9) of the Act. The request to reconsider is denied.

Board File 3395-95-R

48. The parties were in agreement that the only issue outstanding in the subsequent certification application filed on December 12, 1996 was the reconsideration issue before the Board in Board File

No. 3308-95-R. Accordingly, having regard to the disposition of that issue, above, the parties are in agreement that a decision can issue with respect to Board File 3395-95-R.

49. Pursuant to the Board's direction of December 18, 1995, a representation vote was taken on December 19, 1995.

50. Having regard to the agreement of the parties, the Board finds that all employees of Sara Lee Bakery Canada, employed at its retail outlet store in the City of Brampton save and except Managers and persons above the rank of Manager, constitute a unit of employees of the responding party appropriate for collective bargaining.

Clarity Note: For the purpose of clarity, the above-described unit excludes professional and technical employees, engineers, draftsmen, office and sales staff.

51. On the taking of the representation vote directed by the Board, more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in favour of the applicant.

52. A certificate will issue to the applicant.

53. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

0246-96-U Sarnia Construction Association and Mechanical Contractors Association of Sarnia, Applicants v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 663 and Robert J. Humphreys, Responding Parties

Construction Industry - Strike - Local union's business manager writing to certain employers advising them that transfers of employees to job sites after the "shut-down start-time" are prohibited and that employees accepting such transfers will face charges by the union - Board declaring that local union and business manager threatening unlawful strike and issuing cease and desist orders

BEFORE: *G. T. Surdykowski*, Vice-Chair.

APPEARANCES: *David Cowling* and *Andrew Pilat* for the applicants; *James Fyshe* and *Robert Humphreys* for the responding parties.

DECISION OF THE BOARD; May 14, 1996

1. This application for relief under section 144 of the *Labour Relations Act, 1995* was heard on April 22, 1996. By decision dated April 23, 1996, the Board granted the application and made the following declarations and orders:

3. The Board therefor declares that:

(a) The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 663 has violated section 81 of the *Labour Relations Act, 1995*; and that

(b) Robert J. Humphreys has violated sections 81 and 83(1) of the *Labour Relations Act, 1995*.

4. The Board orders that the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 663 and Robert J. Humphreys cease and desist from violating sections 81 and 83(1) of the *Labour Relations Act, 1995*, and specifically that they cease and desist from threatening employees of Lamsars Mechanical Contractors and Chemfab Mechanical Contractors with internal trade union discipline if they accept transfers to the Imperial Oil job site in Sarnia.

5. The Board further orders that everyone who receives notice of this decision, either directly or indirectly, cease and desist from engaging in any unlawful strike activity at the Imperial Oil job site.

2. The applicants are associations of employers which represent certain employers in the construction industry in Lambton County. There was no challenge to their right to bring this application.

3. Section 144(1) of the Act provides that:

144. (1) Where, on the complaint of an interested person, trade union, council of trade unions or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike or any person has done or is threatening to do any act that the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike, it may direct what action, if any, a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

4. The applicants alleged that the responding parties had breached sections 81, 83(1) and 85 of the *Labour Relations Act, 1995*. They also relied on section 107(2) of the Act. These provisions prohibit unlawful strike activity as follows:

81. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

* * *

83. (1) No person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

* * *

85. No trade union shall suspend, expel or penalize in any way a member because the member has refused to engage in or to continue to engage in a strike that is unlawful under this Act.

* * *

107. (2) Any act or thing done or omitted by an officer, official or agent of a trade union or council of trade unions or employers' organization within the scope of the officer, official or agent's authority to act on behalf of the union, council or organization shall be deemed to be an act or thing done or omitted by the union, council or organization.

5. In section 1 of the Act, a "strike" is defined as being conduct which:

1. (1) In this Act,

“strike” includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output;

Section 48(1) of the Act provides that:

48. (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

Section 79(1) of the Act prohibits strikes or lock-outs where a collective agreement is in operation as follows:

79. (1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

6. The material facts were not really in dispute. The conduct complained of by the applicants concerned the employees of Lamsars Mechanical Contractors (“Lamsars”) and Chem-Fab Mechanical Contractors (“Chem-Fab”), which are employer members of the applicants who are engaged in certain work at Imperial Oil in Sarnia, and centres around a dispute between the parties concerning the ability of employers like Lamsars and Chem-Fab to transfer employees to job sites like the one at Imperial after the “shut-down start-time” (which is considered to be after the battery limit blanks have been installed).

7. There was a collective agreement which covers the two employers involved and the employees who they wanted to transfer from other work locations to the Imperial Oil job site in effect at all material times; that is, the provincial collective agreement between the Mechanical Contractors Association Ontario, and the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. That collective agreement contains a management rights article which contains the following clause:

10.03 To hire, discharge, transfer, promote, assign or reassign, demote, lay-off, or discipline employees for just cause.

8. There is nothing in either the principal portion of the collective agreement or in the applicable Local Appendix which on its face limits an employers “right” to transfer employees. The collective agreement also has the requisite no strike or lock-out provision as follows:

ARTICLE 14 - NO STRIKE, NO LOCK-OUT

No employee bound by this Agreement shall strike and no employer bound by this Agreement shall lock-out such an employee.

9. The responding trade union (“Local 663”) is the affiliated bargaining agent of the employee bargaining agency party to the collective agreement which is the trade union “party” (pursuant to section 163(3) of the Act) under that collective agreement which has territorial jurisdiction in Lambton County, which includes the Imperial Oil job site in question. The responding party Robert J. Humphreys is Local 663’s Business Manager.

10. By letter dated April 15, 1996 with respect to a different shutdown, and Shell Oil, the responding parties wrote to the Mechanical Contractors Association of Sarnia as follows:

Recently Shell Oil went into a shutdown mode. Three local contractors bid on the work and initiated work on April 8 at 7:30 a.m. A representative from Shell Oil faxed us a notice that this was the starting time and date of the shutdown.

You are aware that we have a by-law on the books prohibiting the transfer of workers to a jobsite *after* the shutdown starts. The question that has been raised is when would a shutdown be considered to have started. It is the feeling of our Executive Board that when the first perimeter or safing blank is installed, then the shutdown has been deemed to have started. When the flow of raw materials to be used in the process has been interrupted, then the unit is ready for shutdown work.

This situation is being exacerbated by the fact that the employment situation is getting very tight and we do need to gain employment for our members and spread the work around. We have to deal with this now and not put it off for the next couple of months and in light of this, I would ask that you convene a meeting of the M.C.A.S. Executive Board as soon as possible. We will bring a couple of our Executive members and between us we should be able to come up with an understanding on wording to correctly interpret the definition of when a shutdown starts.

11. The responding parties took the same position with respect to the Imperial Oil shutdown, and by letter dated April 18, 1996, wrote to "All Contractors Involved In The Upcoming A & V Shutdown (at) Imperial Oil" as follows:

The understanding of Local 663 is that the feed to the unit is out tonight. The battery limit blanks will be installed by the end of the work day on Thursday with equipment blanking proceeding on the weekend. In light of this situation, in reviewing the by-law on transfers to shutdowns and in acknowledging past practices with contractors in the valley, the following will be the position of Local 663 on transfers to the A & V.

If a collective agreement does not specifically address the timing of a shutdown start time, when the timing on the battery limit blanks being installed will be the point at which *transfers will not be allowed* onto the shutdown. With the by-law in effect, *any member contravening this understanding without the written permission of the Business Manager or Business Agent, will unfortunately be charged* by this office. We trust in the cooperation of *all* members of this organization in promoting the brotherhood concept contained in our Constitutional Pledge.

(emphasis added)

12. In addition, Mr. Humphreys told Andy Pilat, General Manager of the Sarnia Construction Association and Executive Director of the Mechanical Contractors Association of Sarnia, that Local 663 would not allow any of its members to transfer to the Imperial Oil jobsite after 4:00 p.m. on April 18, 1996. "I will not let them work" said Humphreys.

13. This application was filed the next day, on April 19, 1996. When it came on for hearing on April 22, 1996, the responding parties had not taken any action further to their April 18, 1996 letter. However, Mr. Humphreys declined to say that they would not, and it was apparent on the evidence that they still intended to do so but were awaiting the outcome of this application before taking any action. It appeared that the employees of Lamsars and Chem-Fab had become aware of the responding parties' position and that this was causing some concern.

14. The responding parties submitted that they were justified in taking the "position" as expressed in the correspondence and Mr. Humphreys' discussion with Mr. Pilat, which they asserted was all that they had done, in order to achieve a more equitable distribution of available work among Local 663 members. They claimed that there is an applicable past practice which prohibits the transfer of employees to a job site like the Imperial Oil site after a shutdown begins, and they relied upon Local 663 "by-law" which they said applied in that respect. This "by-law" is in the form of a resolution dated August 26, 1975 which is recorded as follows:

Companies want the right to transfer Local men on shutdowns. As this point was discussed with the contractor during negotiations, it was agreed that there would be no transfers of men once the shut down was started.

15. The responding parties denied that they had done anything wrong, and more specifically, they denied that anything which Local 663 or Mr. Humphreys did constituted a unlawful strike or a threat to call or authorize an unlawful strike. They objected to anything which they had done being characterized as being a “threat”. They argued that they had merely advised the employers of their position that the transfers were contrary the collective agreement as interpreted in accordance with past practice, was also in violation of a Local 663 by-law which had existed for more than twenty years, and which they expected Local 663’s members to comply with. The responding parties said that they did not intend to prevent any work from being done or to limit the employers efficiency in that respect. They asserted that Local 663 stood ready to refer any number of competent employees from its hiring hall which the employers required.

16. In the alternative, Local 663 and Mr. Humphreys argued that the Board should dismiss this application in the exercise of its discretion, because to allow it would in effect would be telling Local 663 that it could not enforce its by-laws and this would constitute an unwarranted interference in internal trade union affairs, and also because the employers had alternatives which they had refused or failed to avail themselves of; that is, that it was within the employers’ ability to avoid the situation if they had acted reasonably. Further, they submitted that the employers could file a grievance with respect to the transfer issue and have the matter determined under the grievance arbitration provisions of the collective agreement.

17. I saw no merit to either the main or alternative arguments of the responding parties. The message which they had sent to the employers, and which they continued to send even at the hearing of this application was clear: “If you attempt to transfer your employees we will tell them not to report for work and we will discipline them if they do so.” In the construction industry in this province, members generally pay close attention to and heed the instructions of their union. Consequently, telling the employers that their employees would not work if they were transferred was a meaningful threat that such employees would not work. This constitutes a clear threat to tell or authorize the employees to cease or refuse to work, in this case, unless the employer is acquiesced to the responding party’s view of the collective agreement and their view of how the employers should staff the job.

18. I accepted that the responding parties were motivated by a desire to try to spread the available work among a greater number of Local 663’s members, and that they were undoubtedly under some pressure to do so from unemployed members. That is legitimate concern. However, and notwithstanding the comments in *McMillan-Bathurst Inc.*, [1987] OLRB Rep. Dec. 1568 (request for reconsideration dismissed [1988] OLRB Rep. Mar. 312), the ultimate motive in that respect is irrelevant (see, for example, *The Art Gallery of Ontario*, *supra*, *Monarch Fine Foods Company Limited*, [1986] OLRB Rep. May 661, *Domglas Ltd.*, [1976] OLRB Rep. Oct. 569; Application for judicial review dismissed 78 CLLC p.14,135 (Divisional Court)). What is important was the immediate intent; that is, to limit the ability of the employers involved to perform the shutdown work at the Imperial Oil job site unless they accepted the responding parties’ view of who the employers should employ to do that work, and the responding parties’ apparent willingness and ability to make good under at threat to refuse to allow transferred employees to perform that work (*Horton CBI, Limited*, [1985] OLRB Rep. June 880; *Bay Tower Homes Company Ltd.*, [1988] OLRB Rep. Mar. 259). In the circumstances, such a threat was unlawful.

19. Even Local 663 and Mr. Humphreys agreed that the real dispute between the parties concerns the right of employers under the collective agreement to transfer employees to a shutdown job after the shutdown has begun. Indeed, the union argued that that dispute concerns an interpretation of

the collective agreement which is properly dealt with through the grievance arbitration process, and not by the Board in an unlawful strike application.

20. With respect, I agree with that latter point, which demonstrates that the position of the responding parties in this application was misconceived. It is clear that the dispute between the parties is contractual; that is, they disagree on whether Lambton County employers bound by the collective agreement can transfer employees to perform shutdown work after the shutdown has commenced. This does not mean that anyone bound by the collective agreement, in this case Local 663, can resort to self-help in an attempt to force another party to accept its view of the issue by threatening to impede the work at the job site, in this case by threatening to require employees assigned to do that work to withhold their services. Indeed, one of the reasons why the expedited arbitration process for construction industry grievances in what is now section 133 of the Act was put into the legislation in the first place was to eliminate such job action through respective collective agreement disputes.

21. It is no answer to an application like this one to say that the employers could file a grievance. Perhaps they could, but the employers had not acted outside of the collective agreement (although they may have breached it; that is what is in dispute between the parties). On the other hand, the responding parties had clearly acted outside of the collective agreement and the grievance arbitration process, and it was not open to them to seek to justify their conduct by suggesting that the employers could have capitulated and grieved.

22. Nor did either of the cases cited by the responding parties assist them in that respect. *The Art Gallery of Ontario, supra*, was a picketing case in which the Board was satisfied that the particular picketing being engaged in, while a collective agreement was in effect but while the trade union and employer were engaged in collective bargaining for a new collective agreement, was not designed to have any impact on the employer and did not actually or have the real potential to do so.

23. In *The Corporation of Massey Hall and Roy Thompson Hall, supra*, the employer had suspended two employees without pay and requested that the unions apply two replacements from its hiring hall in accordance with the collective agreement in effect between the parties. The union took the position that the employers had no right to suspend the two employees and refused to refer any replacements from its hiring hall. The employer allowed the suspended employees to continue to work and brought an unlawful strike application in which its primary request for relief was that the union be directed to supply replacement workers as required by the collective agreement. The Board concluded that there had been neither an unlawful strike, nor threat of one, and dismissed the application as follows:

17. Similarly here, the Board cannot conclude that there has either been an actual threat of an illegal strike, or the circumstances are such that there is a real or strong likelihood that an illegal strike will occur, if the employer uses management personnel to perform the work of head electrician and head soundman. The Board does not suggest that an employer must first induce an unlawful strike in order to obtain relief. To the contrary, the statutory language and the Board's approach to these matters is to prohibit any unlawful strike before it starts, provided the Board is satisfied that there is a threat of such a strike or a real likelihood of it. But a mere fear of a strike by the employer is not sufficient to lead the Board to interfere. Here, the union made no comments suggesting that the other employees would strike if management did the work of Still and Saunders. Past practice evidence was not sufficient to indicate a strike would occur. All the work in question was still being performed by bargaining unit employees, with the employer's full knowledge. On this evidence, *the Board cannot conclude that there is a threat or real likelihood of a work interruption if management performs the two jobs. If an unlawful interruption did then result, management could of course apply forthwith to the Board. The application fails on this ground.*

18. The Board turns next to the employer's primary argument, that the refusal of the union to refer replacement employees as required by the terms of the collective agreement, constituted an illegal

strike, and amounted to a refusal to work by the employees or members of the union. The Board assumes, for purposes of this ruling, that a refusal of a union to refer union members as required under a collective agreement could constitute an illegal strike (in this regard, see *International Longshorement's Association, Local 273 et al v. Maritime Employers' Association et al* (1978) 89 D.L.R. (3d) 289; *The Ottawa Board of Education* [1983] OLRB Rep. May 694.) But even assuming such activity could constitute, in appropriate circumstances, an illegal strike, it does not do so here.

19. Employers and unions often engage in power struggles, each flexing their labour relations muscles, and each convinced that the other's authority or power is significantly less than it believes. In the instant case, the employer and the union take significantly different views of the powers each enjoys under the collective agreement. The employer, understandably, takes the view that it is entitled to impose discipline (including suspending employees) without the requirement that it first obtain the union's agreement that the discipline is proper. The employer believes that the union's right to object to a suspension is the customary right enjoyed by unions, to file a grievance. From the employer's perspective, to accede to the union's position would be to provide the union with a right of veto over any discipline imposed; if the union doesn't approve of the action, it will simply refuse to refer replacement employees and the employer will not be able practicably to enforce the suspension. The union, on the other hand, takes the view that the employer cannot discipline employees as it has. The union believes that the referral clause effectively gives it the sole right to staff the bargaining unit with replacement employees, so it declines to refer replacement employees. It can thereby in effect ignore the suspensions. The parties clearly have significant differences of opinion as to the correct meaning and application of several articles or clauses of the collective agreement.

20. What they don't have, however, is a scenario which involves an unlawful strike or raises mischief of the sort encompassed by the prohibition on illegal strikes contained in the *Labour Relations Act*. *There has been no actual work stoppage, nor threat of a work stoppage.* As discussed above, the evidence does not suggest that a stoppage is either imminent or a real likelihood if management personnel perform the work. The rehearsals and shows have all been fully performed. Still and Saunders remain willing and able to continue to perform all their duties and responsibilities and they continue to report for work. In effect, the employer has accepted that Still and Saunders can continue to work. While it maintains the position that they are under suspension without pay, it acquiesces (grudgingly) in their continuing the full performance of their jobs. Unlawful strike applications deal with work interruptions, threatened or actual. Because of the conduct of both parties, there does not appear to be any such interruption or real likelihood of one. There is no doubt that Still and Saunders will continue to show up as scheduled and to perform their jobs. Assuming, as we have, that a refusal to supply any replacement employees as required under a collective agreement can constitute an unlawful strike, in the unique circumstances before the Board, it does not.

21. The Board is being asked, through the expedited procedures for dealing with unlawful strikes, and in the absence of any work interruption or threat thereof, to rule upon the correct interpretation of particular clauses in the collective agreement, and then to direct the specific manner in which the union must fulfil its obligations under those clauses. The activity of real complaint is the union's refusal to comply with (what the employer asserts are) its obligations of referral under the collective agreement. The main remedy sought by the employer underscores this: a direction that the union refer replacement employees other than Still or Saunders. *An order that directs that the respondents cease and desist from calling an unlawful strike, or that requires them to supply replacement employees, would not resolve the dispute. In response, the union might still refer Saunders or Still as the temporary replacement employees, on the basis suggested at the hearing, that they would be the two most senior, available members. The real disputes between the parties are not over an unlawful work stoppage, but over whether the employer has the right to discipline or suspend employees, whether the union must refer replacement employees in such circumstances, and whether it can refer employees on suspension. These are disputes for which arbitration is the appropriate resolution mechanism.* Unlawful strike applications are expedited proceedings which deal with untimely interruptions in work, or threats of such interruptions. In the course of considering whether such unlawful activity has occurred and whether the Board ought to interfere, it may be necessary to interpret and apply numerous clauses in a collective agreement. But the Board will do so in these applications only when it is necessary in order to deal with the unlawful work

interruption. Here, there has been no such interruption or threat of one, and in these circumstances the dispute between the parties is best dealt with in a different context.

(emphasis added)

24. This application was not a case in which the responding parties were refusing to refer Local 663 members to work. On the contrary, their position was that that was what should happen, and they stood ready, able and anxious to do so. But, as the Board recognized in *The Corporation of Massey Hall and Roy Thompson Hall, supra*, a party bound by a collective agreement can neither ask the Board to deal with the collective agreement dispute in the guise of an unlawful strike application, nor threaten a work stoppage or other job action in an attempt to get its way under a collective agreement.

25. Further, a trade union “by-law” like the Local 663 resolution relied upon by the responding parties in this case, is no more than a unilateral declaration of internal union policy or procedure. It cannot trump a collective agreement or the *Labour Relations Act, 1995*, and it is completely appropriate for the Board to intervene in what would otherwise be a internal trade union matter in circumstances where the internal proceedings are being used to engage in, or as a threat to engage in or induce unlawful conduct.

26. Indeed, it appears that this “by-law” was Local 663’s response to the refusal of Lambton County employers to agree with the trade union’s position in collective bargaining, and could be viewed as an attempt to create a practice which it was unable to obtain the employer’s agreement to in collective bargaining, although what in fact happened is for a board of arbitration to determine.

27. In the result, I was satisfied that the responding parties had threatened to call or authorize an unlawful strike contrary to section 81 of the Act, and that the responding party Humphreys had acted in a manner which he knew or ought to have known that, as a reasonable and probable consequence of which, employees of the two employers in issue would engage in an unlawful strike. In my view, section 85 did not apply, because that provision relates to the rights of members of trade unions vis-à-vis their trade union, which is something in which employers have no say or right to participate.

28. Accordingly, I issue the declarations and orders as aforesaid.

3681-95-R Kim Hartsell, Applicant v. United Steelworkers of America, Responding Party v. Seeburn Division, Ventra Group Inc., Intervenor

Termination - Timeliness - Board finding termination application untimely having regard to agreement of employer and union to continue first contract arbitration under Bill 7’s transition provisions - Application dismissed

BEFORE: *Laura Trachuk*, Vice-Chair, and Board Members *O. R. McGuire* and *R. R. Montague*.

APPEARANCES: *Kim Hartsell* for the applicant; *Paula Turtle, Garnet Penny, Donna Campbell, Norm Blakeley* and *Janet Ward* for the responding party; *David M. Chondon, Bryan Gill, Mark Lawrie, Ruth Griepsma* and *Erin Kuzz* for the intervenor.

DECISION OF THE BOARD; May 22, 1996

1. This is an application for termination of bargaining rights. In a decision dated February 2, 1996 the Board directed that a representation vote be held on February 6. The ballot box was sealed

because the responding party (hereafter referred to as the “union”) requested that the application be dismissed for untimeliness.

2. At a hearing on March 4, 1996 the Board dismissed the application by way of an oral ruling. The following are the reasons for that decision.

The Facts

3. The union was certified to represent the employees in the bargaining unit on December 1, 1994. It filed an application for first contract arbitration on July 6, 1995.

4. The first contract arbitration hearings were held on September 14, 1995 and October 10, 1995. On October 10, 1995 the parties were aware of the first draft of Bill 7 which became the *Labour Relations Act, 1995* and which included proposed amendments to the first contract arbitration provisions of the previous legislation. The transition provisions of the Bill provided that a first contract arbitration commenced under the previous legislation would be terminated unless the parties agreed to continue it. The union and the intervenor (hereafter referred to as the “company”) therefore entered into the following agreement:

“The parties agree that if this first agreement arbitration proceeding is continuing after the *Labour Relations Act 1995* (Bill 7) comes into force, then this arbitration shall proceed in accordance with the *Labour Relations Act* as it reads immediately prior to the coming into force of Bill 7.

The parties further agree that in the event that further or other amendments to the *Labour Relations Act* come into force while this proceeding is continuing or before a decision has been issued that the first collective agreement arbitration provisions of the *Labour Relations Act* as it existed prior to any amendments coming into force shall govern this proceeding.”

5. On November 10, 1995 the *Labour Relations Act, 1995* received Royal Assent. On December 5, 1995 the applicant filed a letter with the Board asking that a vote be held to terminate the union’s bargaining rights. The Board requested that the applicant comply with the Board’s procedures and file and serve an application in the proper form. The Board received that application on January 31, 1996.

6. In its response, the union took the position that the application should be dismissed because it is untimely in view of the parties agreement to continue with the first contract arbitration process. A representation vote was held on February 6 and the ballot box was sealed. As of the date of the hearing, the parties had not received the arbitration award.

Evidentiary Ruling

7. The company sought to call evidence with respect to the parties’ discussions and intentions when entering the agreement set out in paragraph 4. The company wished to show that the parties entered the agreement pursuant to the transition provisions of the *Act* and had never discussed section 40. The union objected to the company calling this evidence, and claimed that the agreement spoke for itself. It asserted that as the agreement was unambiguous, evidence with respect to the parties’ discussion surrounding its generation was not admissible. In any case, the union was prepared to agree that the parties did not discuss section 40 when they entered into the agreement.

8. The Board ruled that it would not admit the evidence the company was seeking to introduce. The document in question is clear on its face and unambiguous. Furthermore, the key fact which the company sought to establish through the evidence was conceded by the union. For these reasons, the Board found that the evidence the company sought to introduce would not aid in the determination of the dispute.

Submissions of the Parties

9. The union argued that the application was untimely as the parties' agreement to proceed with the first contract arbitration was an agreement for the purposes of section 40 of the Act. As an agreement under section 40 has the same effect as a collective agreement in making a termination application untimely, this application should be dismissed.

10. The company denied that this agreement to continue a first contract arbitration pursuant to the transition provisions of the *Labour Relations Act, 1995* is an agreement for the purposes of section 40 and argued that it cannot therefore have the effect of making the application untimely. The company submitted that, although it was not trying to revoke the agreement, the parties would have been required to specify in writing that the agreement was irrevocable in order to meet the criteria of section 40. It argued that the agreement cannot have the effect of limiting the rights of the third party applicant to terminate the union's bargaining rights without specific legislative provision. The company referred to the following decisions: *Re: Grey-Owen Sound Health Unit* (1979) 24 O.R. (2d) 510; *Re: Haldimand-Norfolk Regional Health Unit* (1981) 31 O.R. (2d) 730; *Re: Ontario Nurses Association* (1983) 150 D.L.R. (3d) 193; *Suedon Foods Ltd.*, [1995] OLRB Rep. Feb. 166; *Ridgewood Industries*, [1990] OLRB Rep. March 331.

11. The applicant argued that her application should not be found to be untimely because she had not been part of the agreement of the union and the company to continue with the arbitration.

Decision of the Board

12. The transition provisions of the the *Labour Relations and Employment Statute Law Amendment Act, 1995* provide as follows:

3. (1) This section applies with respect to proceedings commenced under the old Act in which a final decision has not been issued on the day on which this section comes into force.

(2) A proceeding continuing after the new Act comes into force shall be decided as if the new Act had been in force at all material times. The presiding person or body shall apply the substantive provisions of the new Act as well as the procedural rules established under it.

(3) Despite subsection (2), the parties to a first agreement arbitration under section 41 of the old Act may agree in writing that the arbitration proceed in accordance with the old Act.

13. Section 41(23) of the "old" Act provided as follows:

41.-(23) An application for a declaration that a trade union no longer represents the employees in the bargaining unit is of no effect if it is filed with the Board after first agreement arbitration is initiated unless it is brought after the first collective agreement is settled and it is brought in accordance with subsection 58(2).

14. Section 40 of the *Labour Relations Act, 1995* provides as follows:

40. (1) Despite any other provision of this Act, the parties may at any time following the giving of notice of desire to bargain under section 16 or 59, irrevocably agree in writing to refer all matters remaining in dispute between them to an arbitrator or a board of arbitration for final and binding determination.

(2) The agreement to arbitrate shall supersede all other dispute settlement provisions of this Act, including those provisions relating to conciliation, mediation, strike and lock-out, and the provisions of subsections 48(7), (8), (11), (12) and (18) to (20) apply with necessary modifications to the proceedings before the arbitrator or board of arbitration and to its decision under this section.

(3) For the purposes of section 67 and section 132, an irrevocable agreement in writing referred to in subsection (1) shall have the same effect as a collective agreement.

15. The issue before the Board can be framed as follows: Is this agreement to continue a first contract arbitration pursuant to the transition provisions of the Act an agreement for the purposes of section 40? An agreement under section 40 must be: a) an irrevocable agreement in writing; b) to refer all matters remaining in dispute between them to an arbitrator or board of arbitration; c) for final and binding determination. The parties' agreement to continue the first contract arbitration process under the transition provisions of the Act clearly meets these criteria. The transition provisions themselves specify that the agreement contemplated is an agreement for the arbitration to "proceed in accordance with the old Act". First contract arbitration under both the old and new Acts is a process by which all matters remaining in dispute are irrevocably referred to a board of arbitration for final and binding determination. The parties agreement therefore met the criteria of an agreement for the purposes of section 40. It is not necessary for parties to specify that they are entering an agreement for the purposes of section 40 as such agreements are determined according to the criteria outlined in the section.

16. First contract arbitrations under both the old and new Acts, as well as agreements under section 40 of the new Act (unchanged from section 38 of the old Act) have the legislated effect of making termination applications untimely. It has consistently been the policy of the *Labour Relations Act*, through numerous amendments, that if the parties enter the arbitration process to resolve their collective bargaining differences, either by agreement, Board, or Ministerial direction, the process is allowed to take its course without resort to economic sanctions, other mediation processes or the risk of termination of bargaining rights. The company conceded at the hearing that as a result of the parties' agreement, the union was not entitled to apply for mediation or conciliation or to strike. It claimed, however, that the effect of making a termination application untimely did not attach to this agreement. This inconsistency was explained by the claim that the right to file for termination of bargaining rights was an important third party right and could not be limited without express wording in the legislation.

17. Generally speaking, it may be true that third party rights cannot be affected by agreements between other parties. This general proposition is qualified, however, by specific statutory events or contexts in which such rights can and are so affected. As long as interest arbitration has been included in the *Labour Relations Act*, the Act has provided that the commencement of the interest arbitration process has the same effect as entering into a collective agreement, thus making resort to any of these other procedures untimely. The limitation of the third party right to terminate bargaining rights is therefore part of a statutory scheme which contemplates that by embarking on contract arbitration, the parties have taken steps to reach an agreement just as they would have if they entered into conciliation or mediation, both of which bar an application for termination of bargaining rights.

18. The transition provisions and the agreement both indicate that the first contract arbitration is to proceed "according to the old Act". According to the old Act, the initiation of an arbitration for first contract made an "application for a declaration that a trade union no longer represents the employees in the bargaining unit" of no effect. The Board's finding that this application is untimely is consistent with both the legislation and the agreement signed by the union and the company.

19. For all of the above reasons, the Board dismissed this application.

20. The Registrar will destroy the ballots cast in the vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

4188-95-R Maurice Beaudoin and Larry Sawatsky, Applicant v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 199 CAW, Responding Party v. **Venest Industries**, a division of Cosma International Inc., Intervenor

Intimidation and Coercion - Representation Vote - Termination - Group of employees alleging that vocal and active union supporter uttered threats and otherwise intimidated employees in days leading up to representation vote - Union winning vote - Employees requesting new vote - Board satisfied that there were no threats or intimidation and seeing no reason why result of vote should not be considered accurate representation of employees' wishes - Application dismissed

BEFORE: *Roman Stoykewych*, Vice-Chair.

APPEARANCES: *Judith Dunstan, Anne Milford, Jocelyn Paradise, Pat Makinson, Roxanne Verbeek, Michael Johnston, Don Chapman and Janet Jamieson* for the applicant; *Frank Luce, Dan MacPherson and Rick Vallance* for the responding party on May 6, 1996; *Eric del Junco and Rick Vallance* for the responding party on May 7, 1996; *R. Andrew Staniusz, Chris Heath and Pat Simpson* for the intervenor

DECISION OF THE BOARD; June 14, 1996

1. This is an application for a declaration terminating the bargaining rights of the responding party trade union.

2. The application was filed with the Board on March 21, 1996. Because of the operational difficulties encountered during the recent strike of the unionized staff of the Board, a vote direction was not issued until April 4, 1996, and the vote itself was not held until April 11, 1996. The ballots cast were immediately counted and the results of the vote, in which a narrow majority of employees voted in favour of the trade union retaining its bargaining rights, were made known to the parties. Representatives of the trade union, the employer and the applicant employees each had, upon the completion of balloting, signed a "Certification of Conduct of Election", signifying their agreement that the balloting had been conducted fairly, that all eligible voters were given a full opportunity to cast their ballots, and that the ballot box was protected in the interest of a fair and secret vote.

3. Subsequent to the announcement of the vote results, however, the Board received written representations from a number of employees ("the employees") concerning alleged improprieties by the trade union or its supporters in the days leading up to the vote. The thrust of the employees' allegations was that John Maynard, an employee who is a vocal and active supporter of the trade union, on four occasions during the period immediately preceding the representation vote uttered threats and otherwise intimidated employees at the workplace. The representations each requested that another vote be held. As a result, the matter was set down for hearing at the Board's premises in Toronto commencing May 6, 1996. Over the course of the two days of hearing, the Board heard the testimony of six witnesses (four called on behalf of the employees, two on behalf of the trade union) with respect to the allegations ultimately pursued by the employees, and entertained the submissions of the parties' counsel in relation to that evidence. What follows is my ruling with respect to these allegations.

4. Anne Milford, an employee at the Venest plant, was the first witness to testify with respect to the alleged incidents. She stated that on April 3, 1996, she entered the non-smoking lunchroom in

order to retrieve her packaged lunch situated there with the intention of eating it elsewhere. Upon entering the room, she indicated that she saw Mr. Maynard, seated with two of his pro-union co-workers. According to Ms. Milford, this trio was widely known in the plant as “the Three Amigos”. It was immediately upon her entry into the room, she asserted, that Mr. Maynard issued forth with a threat. While otherwise clear, her testimony with respect to an alleged “threat” was deeply problematical. On two occasions in her direct examination she stated that Mr. Maynard used the words: “Whoever votes to keep the union *in* should be prepared to move out of town.” This version of the alleged statement was affirmed on at least two further occasions in her cross-examination by trade union counsel, and was changed to more closely correspond to the pleaded allegation (i.e. “whoever tries to vote the union *out* should be ready to move out of town”) only upon being advised of Mr. Maynard’s likely evidence. Ms. Milford testified that she did not engage in any further discussion in the lunchroom, but nevertheless assumed that Mr. Maynard’s comments were directed at her because of the raised voice used by him.

5. Pat Makinson, a co-worker of Ms. Milford, stated that on or about April 9, 1996, she entered into the same lunchroom in order to retrieve her lunch. According to Ms. Makinson, she was accompanied by Anne Milford. She stated that upon entering the lunchroom she saw John Maynard and two other employees, whom she could not identify at the hearing. She testified that she heard Mr. Maynard say the words “That’s fine now, but afterward they better be looking over their shoulders” in a raised voice during the course of the conversation. She was unable to specifically recall any of the immediately preceding words uttered by Mr. Maynard, and her recollection of the other parts of the conversation are at best fragmentary. However, she stated that she assumed from what she described as the “general context” that the statement was meant to refer to her. Ms. Makinson did not engage any of the employees in the lunchroom in conversation and left upon finding her lunch in the refrigerator. It is important to note that Ms. Milford had no recollection of a threat uttered on April 9, 1996.

6. The Board also heard the evidence of Roxanne Verbeek and Jocelyn Paradise, both of whom testified that they too overheard portions of Mr. Maynard’s conversations with fellow employees during which he allegedly uttered threats. According to Ms. Verbeek, on April 8 or 9, 1996, while sitting in the “glove box” area of the plant with a number of other employees, she overheard a portion of Mr. Maynard’s conversation with a group of employees, including Don Chapman. Ms. Verbeek stated that during the conversation, Mr. Maynard said words to the effect that he “would personally go after” anyone voting non-union. Once again, although she was not party to the conversation, she testified that because the words were uttered with great vehemence and volume, and because Mr. Maynard was a highly visible and vocal supporter of the trade union, she assumed it was intended for her ears.

7. The evidence of Ms. Paradise, although relating to what appeared to be yet another alleged incident, was in many respects similar to that of Ms. Verbeek’s. On or about April 3, 1996, while sitting in the glove box area, Ms. Paradise overheard Mr. Maynard stating “Anyone who voted non-union would have to leave St. Catherines”. According to Ms. Paradise, Mr. Maynard was in conversation with Don Chapman at the time. Ms. Paradise did not herself participate in the conversation, but professed to be listening in on it. However, upon careful questioning from counsel for the trade union, Ms. Paradise was unable to recall a single word of the preceding portion of Mr. Maynard’s conversation, and further stated that her mind “went blank” upon hearing the above-noted words and, therefore, did not hear any of the ensuing discussion. Ms. Paradise did relate, however, that shortly after the alleged conversation, she spoke with Mr. Chapman who confirmed that he had heard the conversation, and agreed to be Ms. Paradise’s witness with respect to the incident. Mr. Chapman, it should be noted, was not one of Mr. Maynard’s pro-union friends but instead, appeared to be allied in interest to Ms. Paradise and Ms. Verbeek. Nevertheless, despite featuring prominently in the evidence, and despite being present at the hearing and available to testify, Mr. Chapman was not called as a witness.

8. Underlying, and, in some respects, obscuring the issue of whether or not the alleged threats were in fact made was a “climate of harassment” that was alleged to be directed at the female employees in the workplace (the substantial majority of whom appeared to support the decertification drive). It was alleged by each of the employees that Mr. Maynard consistently used words such as “cocksucker” or “cunt” in reference to them. They also testified that he was prone to angry outbursts and, rather generally, was perceived as a large and menacing presence in the workplace.

9. Mr. Maynard testified on behalf of the trade union. Although he denied calling the employees “names” at any time, he admitted to employing a number of what are, in any context, deeply offensive and degrading expressions to characterize supporters of the decertification campaign. Nevertheless, he denied making any of the threats alleged. It was his testimony that on several occasions during the two week period preceding the vote he had speculated with his pro-union friends as to his own job security in the event that the union was decertified and in so doing, uttered words to the effect of “if they succeed in getting rid of the union, I’m likely to be fired and have to move out of town”. However, he denied implying or suggesting that he would physically harm anyone because of their pursuit of the decertification of the trade union.

10. There was little disagreement between the parties as to the relevant principles the Board ought to apply in these circumstances, and, as a general matter, there was consensus that a party seeking to annul the result of a representation vote must establish that conduct has occurred of a kind that would deprive employees of the ability to express their wishes in the ballot box. In their submissions, the counsel for the parties made reference to various decisions of the Board, including *Greb Industries*, [1979] OLRB Rep. Feb. 89, *Atlas Specialty Steels*, [1991] OLRB Rep. June 728 and *Canadian Red Cross*, [1994] OLRB Rep. Nov. 1592, in support of their respective positions in the matter. Although the Board has considered the submissions of the parties on this and other matters, it is unnecessary to make further reference to them in this decision in light of my findings with respect to the evidence before me.

11. In assessing the evidence, it is important to note that each of the threats alleged to have been made by Mr. Maynard were fragments of overheard conversation with third parties. As a result, in none of the alleged instances did the witness participate in the overall conversation, and, for example, no eye contact was made with their alleged interlocutor. It is, of course, by no means impossible for threats of a particularly disturbing nature to be uttered through the medium of a conversation with a third party. However, in such circumstances an appreciation of the context of the overall conversation is important to evaluate what meaning was intended to be conveyed and whether a threat was in fact uttered. As each of the employees emphasized in their testimony, their conclusion that Mr. Maynard was uttering threats, rather than otherwise engaging in conversation with his work colleagues, was based on their understanding of the overall situation. Yet, a depiction of the specific context of Mr. Maynard’s remarks was notably absent in the evidence of each of the employees’ witnesses and the state of the evidence with respect to this matter can be characterized as fragmentary at best. Of particular concern in this respect is the evidence of Ms. Makinson. In the absence of a concrete conversational context, it is far from clear *who* should be “looking over their shoulders” and whether “looking over their shoulders” should be in response to potential physical, employment or social consequences.

12. The evidence relating to the alleged threats in the lunchroom is also characterized by substantial internal inconsistency. For example, Ms. Makinson testified that she attended in the lunchroom with Ms. Milford on April 9, 1996, during which time a threat was uttered. However, Ms. Milford did not testify with respect to an incident on April 9, 1996, but testified instead to events on April 3 with no reference to Ms. Makinson. I do not accept counsel for the employees’ submission that the

numerous discrepancies of this sort in the witnesses' testimony ought to be disregarded given what she characterized as the considerable passage of time. The events in question took place only four or five weeks prior to the giving of their testimony at the hearing. Moreover, each of the witnesses were sufficiently focused on the significance of the events to provide submissions to the Board within a week of their alleged occurrence. While I am not prepared to place decisive significance upon the witnesses' inability to recollect the precise circumstances, dates or sequence of events, I am persuaded that it is a factor seriously weighing against the acceptance of their testimony.

13. Moreover, even if considerable latitude is accorded the witnesses in this regard, their evidence, whether taken separately or together, does not provide a particularly coherent account of events. Thus, if it were accepted that Ms. Makinson was accompanied by Ms. Milford when entering the lunchroom on April 9, as was asserted by Ms. Makinson, it is difficult to fathom how Ms. Milford could not be able to recall a threat, if one were made. On the other hand, if it is accepted that either (or both) Ms. Makinson or Ms. Milford were mistaken as to the exact date of the alleged events, and that the lunchroom incidents were, in fact, one incident, then the accounts of the events described by the two witnesses are diametrically opposed. Indeed, notwithstanding employee counsel's valiant effort at rehabilitation in re-examination, I find that Ms. Milford's evidence essentially confirms the thrust of Mr. Maynard's version of events, *viz.*, that the statement made by Mr. Maynard included reference to adverse consequences being visited upon employees who voted in favour of the union.

14. The fragmentary nature of the evidence of Ms. Verbeek and Ms. Paradise relating to the alleged threats in the glove box area also is the cause for considerable concern. Both witnesses asserted in their evidence that the purported threats arose in the course of Mr. Maynard's conversations with Mr. Chapman, but, as noted, the witnesses were unable to provide any further details of the conversations. If the evidence of Ms. Verbeek and Paradise is to be believed, Mr. Chapman was the person actually involved in the conversations which contained the alleged threats, and, one must assume, would be in a substantially better position to testify with respect to these statements than they.

15. Given the fragmentary account of these conversations in the testimony of Ms. Verbeek and particularly of Ms. Paradise, and their concomitant inability to relate a context in which the statements were allegedly made, and, further, in light of Mr. Maynard's express and repeated denials of the allegations, the Board accepts trade union counsel's characterization of the evidence as "crying out" for the testimony of Mr. Chapman with regard to his conversations with Mr. Maynard. Yet, despite being available to be called as a witness - and indeed, it was the evidence of Ms. Paradise that arrangements had been made for that very purpose - Mr. Chapman was not called. Under such circumstances, it is appropriate to draw the adverse inference that, had Mr. Chapman been called as a witness, his testimony in relation to the glove box incidents would not support the version of events described in the evidence of either Ms. Paradise or Ms. Verbeek.

16. In addition to these uncertainties and inconsistencies in the evidence, it became apparent during the hearing that the witnesses called on behalf of the employees experienced considerable difficulty in resisting the tug of self-interest in the course of their characterization of events. Particularly in relation to questions put by union counsel as to their awareness of the highly visible role taken by the employer in the events leading up to the vote, the witnesses each demonstrated inexplicable and improbable lapses of memory or understanding such as to make me conclude that they were, at the least, capable of shading their recollection of events so as to correspond to their perceived interest in the matter. In particular, it is most improbable that, in the circumstances of the decertification campaign in which the employer participated in a highly visible and partisan manner, that witnesses would be unable to identify the employer as favouring the "No union" option. Moreover, it simply strains credulity that each of the witnesses did not read any of the numerous pieces of correspondence addressed to them by the employer because "they threw them out without opening the envelope."

17. This is not to suggest that I necessarily accept the trade union's argument that the employees were engaged, in effect, in an organized attempt to deceive the Board, and it will therefore be unnecessary to review the evidence with respect to that matter. Nevertheless, it is apparent that, in the highly-charged environment of the decertification drive, the witnesses were easily prepared to assume the very worst of Mr. Maynard, a man they clearly (and, given his penchant for disgusting commentary, justifiably) distrusted and disliked. Accordingly, the reliability of their already fragmentary perceptions and accounts of the events to which they testified must be further discounted and, bearing this in mind, it is by no means improbable that they may have perceived any of Mr. Maynard's speculations as to his own predicament upon decertification as referring to them.

18. It must also be noted, however, that Mr. Maynard, for his part, was not immune from the appeals of self-interest in the course of the giving of his evidence, and, more generally, was not an impressive witness. Especially with respect to his testimony in relation to alleged contacts that the witnesses had with members of management immediately prior to their sending representations to the Board, it is apparent that Mr. Maynard was prepared to embellish his testimony in a particularly self-serving manner. And, as was the case with the employee witnesses, Mr. Maynard brought the highly partisan atmosphere of the decertification campaign into the hearing room, and the reliability of his evidence must be seriously questioned in that light as well.

19. Nevertheless, his evidence denying the allegations was not subject to the same problems of lack of clarity and internal inconsistency exhibited by the employees' witnesses and, bearing in mind all of the circumstances, I find it an account more consistent with the inherent probabilities of the events. Accordingly, having regard to all of the evidence before me, I conclude that Mr. Maynard's evidence of denial is to be preferred to each of the employees' witness on the question of whether the alleged statements were made. Therefore, I find, on balance, that the allegations of threats were not made out in the evidence and I am persuaded that the employees' objection to the vote must fail.

20. In this regard, counsel for the employees submitted that Mr. Maynard's consistent practice of using degrading and offensive language in relation to the female employees in the workplace was sufficient in itself to poison the work environment such as to cause employees to be incapable of asserting their will in the ballot box. However appalling the conduct might be (and it is hardly diminished by the fact that some of it may have occurred in the presence of members of the union's shop committee) the evidence falls far short of establishing the effect that counsel suggests. Indeed, one can imagine few courses of conduct less conducive of inducing employees to support a trade union than the one apparently undertaken by Mr. Maynard. In fact, if anything, the reverse may be true.

21. Having regard to all the evidence before me and to the submissions of the parties, I am satisfied that Mr. Maynard did not threaten or intimidate his fellow workers in the days prior to the representation vote, and accordingly, see no reason why the result of the vote should not be considered an accurate representation of the employees desire to be represented by the trade union.

22. As noted above, not more than fifty per cent of the ballots cast by employees in the bargaining unit were cast in opposition to the responding party.

23. The application is therefore dismissed.

24. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

25. The employer is directed to post copies of this decision immediately, adjacent to all copies of the "Notice of Vote and of Hearing" posted previously. These copies must remain posted for 30 days.

COURT PROCEEDINGS

4214-94-R (Court File No. 405/95) Kubota Metal Corporation Fahramet Division, Applicant v. United Steelworkers of America and Ontario Labour Relations Board, Respondents

Certification - Evidence - Judicial Review - Trade Union - Trade Union Status - Steelworkers' union applying for certification at workplace with employees' association - Union arguing that association not a "trade union" within meaning of the Act and that Board should certify Steelworkers' without representation vote - Employees' association having twenty-year history of negotiating agreements with employer setting out terms and conditions of employment, but association having no constitution and no members - Board finding that association not a trade union - Certificate issuing - Employer applying for judicial review and alleging that Board's decision patently unreasonable and based on findings of fact for which there was no evidence - Application for judicial review dismissed by Divisional Court

Board decision reported at [1995] OLRB Rep. April 467.

Ontario Court of Justice (Divisional Court), Southey, Saunders and Borins JJ., May 7, 1996.

Southey J. (endorsement): Application is dismissed.

There was ample evidence to support the findings of the Board in paragraph 41 of its Decision that the Committee did not possess a structure sufficient for it to be described as a "trade union" under the *Labour Relations Act*, and that its existence is not sufficiently independent from the employer. The conclusion of the Board was not patently unreasonable.

Having reached the above decision, it is unnecessary for us to deal with the preliminary motion of the union regarding the status of the employer to bring this application for judicial review.

The application is dismissed. The applicant will pay the costs of the Union, hereby fixed at \$3,500. The Board does not ask for costs.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1996

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1675-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. C. Villeneuve Construction Co. Ltd. (Respondent)

Unit: "all employees in the employ of C. Villeneuve Construction Co. Ltd. engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors and truck drivers employed in on-site construction in the Township of McMillan and the adjacent Townships of Fintry, Auden, Gill, Storey, Arnott, Cross, McCoig and Mulloy, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working forepersons and persons above the rank of non-working foreperson" (9 employees in unit) (*Having regard to the agreement of the parties*)

2130-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. C. Villeneuve Construction Co. Ltd. (Respondent)

Unit: "all employees in the employ of C. Villeneuve Construction Co. Ltd. engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, truck drivers and labourers employed in on-site construction in the Township of Kendry and the adjacent Townships of Webster, Beniah, Colquhoun, Calder, Bradburn, Sydere, Haggart and Alexandra, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working forepersons and persons above the rank of non-working foreperson" (11 employees in unit) (*Having regard to the agreement of the parties*)

0659-95-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Toronto, Barrie and the Ontario Provincial Conference of the I.U.B.A.C., (Applicants) v. Fahuki Construction Incorporated, (Respondent)

Unit: "all bricklayers, bricklayers apprentices, stonemasons and stonemasons apprentices, employed by the Employer in all sectors of the construction industry in the Province of Ontario save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1438-95-R: United Steelworkers of America (Applicant) v. The Corporation of the Town of Ancaster (Respondent) v. Canadian Union of Public Employees and its Local 2064 (Intervener)

Unit: "all employees of The Corporation of the Town of Ancaster regularly employed for not more than 24 hours per week for the Corporation of the Town of Ancaster in Works (Roads), Recreation, Parks, Cemeteries and Arenas, including the Custodian at the Aquatic Centre, save and except Foremen, persons above the rank of Foreman, Office Staff and Employees in bargaining units for which any trade union held bargaining rights as of January 23rd, 1996 and Aquatic Centre Swimming Pool Association Staff" (35 employees in unit) (*Having regard to the agreement of the parties*)

1544-95-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. Olympus Plastics Ltd. (Respondent)

Unit: "all employees of Olympus Plastics Ltd. at 33 Lorena Street in the City of Barrie, save and except supervisors, persons above the rank of supervisor, sales, office and clerical staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

2718-95-R: Ontario Public Service Employees Union (Applicant) v. Children's Aid Society of the District of Rainy River Inc. c.o.b. as Family and Children's Services of the District of Rainy River (Respondent)

Unit: “all employees of the Children’s Aid Society of the District of Rainy River Inc. c.o.b. as Family and Children’s Services of the District of Rainy River, in the District of Rainy River, save and except Supervisors, persons above the rank of Supervisor, Administrative Assistant, Financial Administrator, Family Relief Co-ordinator, Payroll and Records Co-ordinator, Special Services Co-ordinator, Custodian and part-time and casual employees in the Emergency After Hours Service, Special Services at Home, Family Relief and Supervised Access programs” (42 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Bargaining Agents Certified Subsequent to Vote

3085-95-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local 46 (Applicant) v. Gerald A. Taunton, c.o.b. as T & M Plumbing & Mechanical (Respondent)

Unit: “all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Gerald A. Taunton, c.o.b. as T & M Plumbing & Mechanical in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Gerald A. Taunton, c.o.b. as T & M Plumbing & Mechanical in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

Number of names of persons on revised voters’ list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

3842-95-R: Seafarers International Union (A.G.L.I.W.D.) (Applicant) v. Windsor Casino Limited (Respondent)

Unit: “all persons employed as deckhand/ordinary seaman by Windsor Casino Limited on the “Northern Belle” vessel at Windsor, Ontario” (31 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	39
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	21
Number of segregated ballots cast by persons whose names appear on voter’s list	8
Number of segregated ballots cast by persons whose names do not appear on voters’ list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

3869-95-R: Association of Allied Health Professionals: Ontario (Applicant) v. The Penetanguishene General Hospital (Respondent)

Unit: “all paramedical employees of The Penetanguishene General Hospital in the Municipality of Penetanguishene, save and except supervisors, persons above the rank of supervisor, and persons in any bargaining unit for which any trade union held bargaining rights as of February 6, 1996” (33 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	33
Number of persons who cast ballots	22

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

3880-95-R: Teamsters Union Local 847 (Applicant) v. The Hospital for Sick Children (Respondent) v. United Plant Guard Workers of America, Local 1962 (Intervener)

Unit: "all security guards employed by The Hospital for Sick Children in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

3882-95-R: Union of Needletrades, Industrial and Textile Employees (Applicant) v. Suzy Shier Inc. (Respondent)

Unit: "all employees of Suzy Shier Inc. c.o.b. as Suzy Shier in the North York Sheridan Mall, 1700 Wilson Avenue in the Municipality of Metropolitan Toronto, save and except store manager and persons above the rank of store manager" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1

3887-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. 1131048 Ontario Inc. c.o.b. as Comptec Sales & Service (Respondent)

Unit: "all employees of 1131048 Ontario Inc. c.o.b. as Comptec Sales & Service in the Township of Dover, save and except supervisors, persons above the rank of supervisor, office and sales staff" (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	2

3911-95-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Movenpick Marchelino - Eaton Centre (Respondent)

Unit: "all employees of Movenpick Marchelino - Eaton Centre employed at the Toronto Eaton Centre in the Municipality of Metropolitan Toronto, save and except Assistant Managers, persons above the rank of Assistant Manager, and office staff" (41 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	1

3931-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent)

Unit: "all employees of Zellers Inc. employed in the City of Sudbury, save and except Supervisors/Group Merchandisers, persons above the rank of Supervisor/Group Merchandiser, Loss Prevention Officers, Personnel Clerks, Pharmacy Managers, Graduate and Undergraduate Pharmacists, including Pharmacy Interns and Apprentice Pharmacists, and students employed in a co-operative work program" (0 employee in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	113
Number of persons who cast ballots	99
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	99
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	74
Number of ballots marked against applicant	25
Number of ballots segregated and not counted	0

3958-95-R: Industrial and Commercial Workers' Union (ILGWU) (Applicant) v. Service Star Building Cleaning Inc. (Respondent)

Unit: "all employees of Service Star Building Cleaning Inc. in the City of Cornwall, save and except supervisors and persons above the rank of supervisor" (33 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	40
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	0

3960-95-R: Ontario Sheet Metal Workers' & Roofers' Conference Sheet Metal Workers' International Association (Applicant) v. Alkaron Metals Inc. (Respondent)

Unit: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of Alkaron Metals Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of Alkaron Metals Inc. in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

3975-95-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Robert Somody Ltd. (Respondent)

Unit: “all employees of Robert Somody Ltd. in the Regional Municipality of Ottawa-Carleton, save and except managers, all persons above the rank of manager, office and clerical staff” (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

3985-95-R: Canadian Union of Public Employees (Applicant) v. Ottawa Regional Hospital Linen Service (Respondent) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Intervener)

Unit: “all employees of Ottawa Regional Hospital Linen Service Inc., in Ottawa, Ontario save and except Supervisors, persons above the rank of Supervisor, office and sales staff, drivers, and persons regularly employed for not more than 24 hours per week” (97 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	98
Number of persons who cast ballots	86
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	86
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	73
Number of ballots marked in favour of intervener	12
Number of ballots segregated and not counted	0

3998-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hy & Zel's The Warehouse Drugstore Ltd. (Respondent)

Unit: "all employees of Hy & Zel's The Warehouse Drugstore Ltd. at 725 Warden Avenue, Scarborough, Ontario, save and except Assistant Store Managers, persons above the rank of Assistant Store Manager, Point of Sale Coordinators, Graduate and Undergraduate Pharmacists, including Pharmacy Interns and Apprentice Pharmacists" (46 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	39
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	11

3999-95-R: The Association of Allied Health Professionals: Ontario (Applicant) v. Central Hospital (Respondent)

Unit: "all paramedical employees of the Central Hospital in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons employed for not more than 24 hours per week and students employed during the school vacation period and persons in any bargaining unit for which any trade union held bargaining rights as of February 16, 1996." (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0

4011-95-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. KML Engineered Homes (Respondent)

Unit: "all employees of KML Engineered Homes in the Province of Ontario, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0

4020-95-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Ingersoll Plastics Inc. (Respondent)

Unit: "all employees of Ingersoll Plastics Inc. in the Town of Ingersoll, save and except supervisors, persons above the rank of supervisor, sales, clerical and office staff" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	3

4056-95-R: Service Employees' Union, Local 210 (Applicant) v. Blenheim Community Village (Respondent)

Unit: “all employees of Blenheim Community Village located in Blenheim, Ontario, save and except supervisors, persons above the rank of supervisor, Registered Nurses, office and clerical employees, Activation Director, Cook Supervisor and Environmental Services Supervisor” (81 employees in unit)

Number of names of persons on revised voters' list	81
Number of persons who cast ballots	64
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	44
Number of ballots marked against applicant	19

4071-95-R: United Food and Commercial Workers International Union, Local 333 (Applicant) v. Group 4 C.P.S. Limited (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener)

Unit: “all security guards of Group 4 C.P.S. Limited in the County of Sussex, County of Kent, County of Middlesex, County of Oxford, County of Perth, County of Essex, County of Huron, County of Lambton, save and except Guard Inspectors or their designates, persons above the rank of Guard Inspector or their designate, office, clerical and sales staff and students employed during the school vacation period, County of Wellington, County of Brant, Regional Municipality of Waterloo, Regional Municipality of Hamilton-Wentworth, Town of Milton, Town of Haldimand, City of Burlington, City of Niagara Falls, City of St. Catharines, Town of West Lincoln, Town of Grimsby, City of Welland, Town of Fort Erie, Town of Dunville, City of Clarkson (Petro Canada), save and except Site Supervisors or their designates, Guard Inspectors or their designates, persons above the rank of Site Supervisor or their designate, Guard Inspector or their designate, office, clerical and sales staff and students employed during the school vacation period” (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

4145-95-R: United Steelworkers of America (Applicant) v. Clemmer Industries Limited (Respondent)

Unit: “all employees of Clemmer Industries Limited in the Regional Municipality of Waterloo save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (56 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	58
Number of persons listed as in dispute	0
Number of persons who cast ballots	52
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	52
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	0

4148-95-R: Christian Labour Association of Canada (Applicant) v. Copper Terrace Nursing Home (Respondent)

Unit: “all registered and graduate nurses and all registered practical nurses (registered nursing aides) employed in a nursing capacity at Copper Terrace Nursing Home in the City of Chatham, save and except administrator,

director of nursing, supervisors, persons above the rank of supervisor and office and clerical staff” (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	23
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	21
Number of segregated ballots cast by persons whose names appear on voter’s list	2
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	2

4234-95-R: Service Employees’ Union, Local 210 (Applicant) v. Brouillette’s Manor Limited (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: “all employees of Brouillette’s Manor Limited at Tecumseh, save and except supervisors, persons above the rank of supervisor and registered nurses” (43 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	44
Number of persons who cast ballots	42
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	42
Number of segregated ballots cast by persons whose names appear on voter’s list	0
Number of segregated ballots cast by persons whose names do not appear on voters’ list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	38
Number of ballots marked in favour of intervener	4
Number of ballots segregated and not counted	0

0030-96-R: Christian Labour Association of Canada (Applicant) v. Euro United Import and Export Inc. (Respondent)

Unit: “all employees of Euro United Import and Export Inc. at 2115 South Service Road West in the Town of Oakville, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (97 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	106
Number of persons who cast ballots	100
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	76
Number of segregated ballots cast by persons whose names appear on voter’s list	23
Number of segregated ballots cast by persons whose names do not appear on voters’ list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	84
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	1

0081-96-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Sani Mobile S.V.O. Inc. (Respondent)

Unit: “all employees of Sani Mobile S.V.O. Inc. in the Province of Ontario, save and except office, clerical, sales, Manager and those above the rank of Manager” (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	6
Number of persons who cast ballots	6
Number of segregated ballots cast by persons whose names appear on voter’s list	6
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0

0096-96-R: Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. Niagara-on-the-Lake Hydro Electric Commission (Respondent)

Unit: "all employees of Niagara-on-the-Lake Hydro Electric Commission, save and except the general manager, the secretary/treasurer, secretary to the general manager, office manager, engineer supervisor, operations superintendent, foreman and persons in bargaining units for which any trade union held bargaining rights as of April 4, 1996" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

0109-96-R: Labourers' International Union of North America, Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent)

Unit: "all employees of Waterford Building Maintenance Inc. engaged in cleaning and maintenance at 637 Lakeshore Boulevard West, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, non-working forepersons, office and clerical staff" (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	1

0124-96-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. The Toronto Group Homes Inc. (Respondent)

Unit: "all employees of The Toronto Group Homes Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (44 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	34
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

3319-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Canadian Highways International Corporation (Respondent)

4069-95-R: United Steelworkers of America (applicant) v. Burns International Security Services Limited (Respondent) v. United Food and Commercial Workers International Union, Local 333 (Canadian Security Union) and International Union United Plant Guard Workers of America Local 1956 (Interveners)

Applications for Certification Dismissed Subsequent to Vote

2928-95-R: Ontario Public Service Employees Union (Applicant) v. Alcoholism & Drug Addiction Research Foundation (Respondent)

Unit: "all employees of the Alcoholism & Drug Addiction Research Foundation in the City of London, save and except supervisors and persons above the rank of supervisor." (36 employees in unit)

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	2

2950-95-R: Labourers' International Union of North America, Local 1059 (Applicant) v. The Corporation of the Town of Wingham (Respondent)

Unit #1: "all employees of The Corporation of the Town of Wingham, in the Town of Wingham, save and except supervisors, persons above the rank of supervisor, office and clerical staff, and mechanical staff" (9 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	2

3311-95-R: Canadian Union of Public Employees (Applicant) v. Woodgreen Community Centre of Toronto (Respondent)

3671-95-R: Canadian Hotel and Restaurant Employees (C.H.A.R.E.) (Applicant) v. The King Edward Hotel (Respondent) v. Hotel Employees Restaurant Employees Union, Local 75 (Intervener)

Unit: "all employees of the King Edward Hotel employed at 37 King Street East in the City of Toronto, save and except supervisors, persons above the rank of supervisors, management trainees, office and sales staff, accounting staff, security staff and reservation staff" (127 employees in unit)

Number of names of persons on revised voters' list	272
Number of persons who cast ballots	166
Number of ballots marked in favour of applicant	72
Number of ballots marked in favour of intervener	93
Number of ballots segregated and not counted	1

3822-95-R: United Steelworkers of America (Applicant) v. 752283 Ontario Inc. (Respondent)

Unit: "all employees of Loeb Manotick in the Town of Manotick, save and except Department Managers, and persons above the rank of Department Manager, office and clerical staff" (109 employees in unit)

Number of names of persons on revised voters' list	109
Number of persons who cast ballots	92
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	90
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	59
Number of ballots segregated and not counted	2

3881-95-R: Union of Needletrades, Industrial and Textile Employees (Applicant) v. Suzy Shier Inc. (Respondent)

Unit: "all employees of Suzy Shier Inc. c.o.b. as Suzy Shier at Unit C-7 in the Woodbine Centre, 500 Rexdale Blvd., in the Municipality of Metropolitan Toronto, save and except store manager and those above the rank of store manager" (8 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	5

3883-95-R: Union of Needletrades, Industrial and Textile Employees (Applicant) v. Suzy Shier Inc. (Respondent)

Unit: "all employees of Suzy Shier Inc. c.o.b. as Suzy Shier at First Canadian Place Centre, 100 King Street West in the Municipality of Metropolitan Toronto, save and except store manager and those above the rank of store manager" (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	2

3932-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. The Elmwood Group Limited (Respondent)

Unit: "all employees of The Elmwood Group Limited in the City of St. Catharines, save and except supervisors, those above the rank of supervisor, office, clerical, sales staff and employees who work less than 24 hours per week" (45 employees in unit)

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	49
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	48
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	29
Number of ballots segregated and not counted	0

3945-95-R: United Steelworkers of America (Applicant) v. Chapters Inc., c.o.b. as The Book Company (Respondent)

Unit: "all employees of Chapters Inc., c.o.b. as The Book Company at 100 King Street West, in the Municipality of Metropolitan Toronto, save and except Manager and persons above the rank of Manager" (3 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

4087-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. The Garden Market (Respondent)

Unit: "all employees of The Garden Market Inc. in the Town of Smiths Falls save and except Assistant Store Manager and persons above the rank of Assistant Store Manager and office and clerical staff" (23 employees in unit)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	19
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	19
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	16

4094-95-R: I.W.A. Canada, Local 2693, Industrial Wood & Allied Workers of Canada (Applicant) v. 917360 Ontario Ltd. o/a Ignace Saw (Respondent)

Unit: "all employees of Ignace Saw at its sawmill and mill yard in the Townships of Ignace and Osaquon, save and except supervisors, persons above the rank of supervisor, and office and sales staff" (19 employees in unit)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	0

4138-95-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. K-Mart Canada Limited (Respondent)

Unit: "all employees of K-Mart Canada Limited employed in the City of St. Thomas, save and except department managers, persons above the rank of department manager, loss prevention officers and students employed in a co-operative work program" (82 employees in unit)

Number of names of persons on revised voters' list	80
Number of persons who cast ballots	76
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	0

Number of segregated ballots cast by persons whose names appear on voters' list	76
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	45

4178-95-R: United Steelworkers of America (Applicant) v. Rafik Ghorbrial Pharmacy Ltd. c.o.b. as Shoppers Drug Mart (Respondent)

Unit: "all employees of Rafik Ghorbrial Pharmacy Ltd. c.o.b. as Shoppers Drug Mart in the Town of Whitby, save and except Assistant Managers, persons above the rank of Assistant Manager, Cosmetics Manager, Merchandising Manager, Pricing Systems Manager, Head Cashier, Pharmacists and office and clerical staff" (51 employees in unit)

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	48
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	47
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	32
Number of ballots segregated and not counted	1

4211-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. Towland-Hewitson Construction Limited (Respondent)

Unit: "all employees of Towland-Hewitson Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of Towland-Hewitson Construction Limited in all other sectors in the District of Rainy River engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons listed as in dispute	0
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

4245-95-R: IWA Canada Local 1-1000 (Applicant) v. Madawaska Hardwood Flooring Inc. (Respondent)

Unit: "all employees of Madawaska Hardwood in the Town of Renfrew save and except supervisors and persons above the rank of supervisor, office sales and purchasing staff, persons regularly employed for not more than twenty four hours per week, and persons employed under a government sponsored training program" (50 employees in unit)

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	50
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	49
Number of segregated ballots cast by persons whose names appear on voters' list	1

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	33
Number of ballots segregated and not counted	1

0082-96-R: IWA - Canada (Applicant) v. Hornby Box & Pallet A Division of Pallet Pallet Inc. (Respondent)

Unit: "all employees of Pallet Pallet Inc. at its Hornby Box & Pallet division at Acton, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff" (10 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	0

0084-96-R: United Steelworkers of America (Applicant) v. MacMaster Pontiac Buick Cadillac Ltd. (Respondent)

Unit: "all employees of MacMaster Pontiac Buick Cadillac Limited in the Town of Simcoe, save and except managers, persons above the rank of manager, office and clerical employees and sales staff" (21 employees in unit)

Number of names of persons on revised voters' list	21
Number of persons listed as in dispute	0
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	0

0125-96-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent)

Unit: "all employees of Zellers Inc. employed at its store located at 285 Geneva Street, Fairview Mall, St. Catharines, Ontario, save and except Supervisors/Group Merchandisers, persons above the rank of Supervisor/Group Merchandisers, Loss Prevention Officers, Personnel Clerks, Pharmacy managers, Graduate and Undergraduate Pharmacists including Pharmacy Interns and Apprentice Pharmacists, and students employed in a co-operative work program" (127 employees in unit)

Number of names of persons on revised voters' list	123
Number of persons who cast ballots	122
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	122
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	40
Number of ballots marked against applicant	82

Applications for Certification Withdrawn

1673-94-R; 1674-94-R; 1854-94-R; 2103-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. C. Villeneuve Construction Co. Ltd. (Respondent)

2182-94-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. Dywidag Systems International (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener)

2768-95-R: United Food & Commercial Workers, Local 206, Chartered by the United Food and Commercial Workers International Union, CLC, AFL-CIO (Applicant) v. Lionhead Golf & Country Club, Division of Kaneff Properties Limited (Respondent)

3962-95-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Promark Aluminum Ltd. (Respondent)

4051-95-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Budget Rent A Car (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

3917-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Famous Players Inc. (Respondent) (*Terminated*)

2165-95-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. Regional Municipality of Haldimand-Norfolk (Grandview Lodge and Norview Lodge) (Respondent) (*Terminated*)

2201-95-R: Canadian Union of Public Employees Local 3437 (Applicant) v. Cedarbrook Lodge Management Corporation (Respondent) (*Terminated*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3975-93-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Uno Carpentry Limited (Formerly Urbacon Carpentry Limited) and Urbacon Limited (Respondents) (*Dismissed*)

4174-93-R: La Co-Opérative De Pointe-Aux-Roches, 1015195 Ontario Limited and Charles Desmarais (Applicant) v. United Food and Commercial Workers International Union, Local 278W, and The United Brotherhood of Carpenters and Joiners of America - Local 3054 (Respondents) v. United Co-operative of Ontario and UCO Petroleum Inc. (Interveners) v. Group of Employees (Objectors) (*Dismissed*)

1164-94-R; 1352-94-R; 2818-94-R; 4349-94-R; 2252-95-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Delsan Contracting Ltd., Environmental Abatement Services Inc. (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Environmental Abatement Services Inc. and Delsan Demolition Limited (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 527 (Intervener); United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Delsan Demolition Limited, Environmental Abatement Services Inc., Delsan Environmental Group Inc., Delsan Environmental Services Inc. and Delsan Environmental Group (Respondents); United Brotherhood of Carpenters and Joiners of America, Locals 93 and 2041 (Applicant) v. Delsan Demolition Limited, Environmental Abatement Services Inc., Delsan Environmental Group Inc., Delsan Environmental Services Inc. and Delsan Environmental Group, Philip Environmental Inc. (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 93 and (Applicant) v. Delsan Demolition Limited, Environmental Abatement Services Inc., Delsan Environmental Group Inc., Delsan Environmental Services Inc. and Delsan Environmental Group (Respondents) (*Withdrawn*)

0334-95-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. 134518 Canada Inc., Rockform Concrete Forming (London) Ltd., M.C. Leal Corporation, Rockform Concrete Ottawa Incorporated, Manuel Leal and Maria J. Oliveira (Respondent) (*Granted*)

0869-95-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 (Applicant) v. Tilbury Concrete Transport Inc. and Tilbury Concrete Inc. (Respondents) v. Canadian Union of Operating Engineers and General Workers (Intervener) (*Granted*)

1469-95-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. P. & J. Steel Erectors Ltd., Milan Steel Erectors Inc., Mick Joksimovic, Miljan Joksimovic (Respondents) (*Withdrawn*)

2367-95-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. PCL Constructors Eastern Inc. and 18127 Alberta Ltd. (Respondents) (*Withdrawn*)

2433-95-R: The International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Aries Electric Services Ltd. and Acro Electric Services Ltd. (Respondents) (*Endorsed Settlement*)

2657-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. PCL Construction Limited PCL Construction Group Inc., PCL Constructors Inc. PCL Industrial Constructors Inc., PCL Constructors Eastern Inc. PCL Civil Constructors (Canada) Inc., PCL Constructors Prairie Inc. (Respondents) (*Withdrawn*)

2967-95-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 1075777 Ontario Inc., c.o.b. as Lorne's Electric and 291360 Ontario Limited, c.o.b. as Lorne's Electric (Respondents) (*Endorsed Settlement*)

3049-95-R: The International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Baragar & Russell Limited and Systems-Elect Ltd. (Respondents) (*Withdrawn*)

3128-95-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. 933950 Ontario Ltd., Gym-Con Ltd. (Respondents) (*Withdrawn*)

3285-95-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. The McBride Group Inc., 529442 Ontario Limited o/a McBride Group Design and Renovation (Respondents) (*Withdrawn*)

3715-95-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Trio Roofing Ltd., Trio Roofing Systems Inc. (Respondents) (*Granted*)

4016-95-R: International Brotherhood of Painters and Allied Trades, and Glaziers, Local 1819 (Applicant) v. Byrne Glass Enterprises Limited and Raywin Industries Limited (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3975-93-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Uno Carpentry Limited (Formerly Urbacon Carpentry Limited) and Urbacon Limited (Respondents) (*Dismissed*)

4174-93-R: La Co-Opérative De Pointe-Aux-Roches, 1015195 Ontario Limited and Charles Desmarais (Applicant) v. United Food and Commercial Workers International Union, Local 278W, and The United Brotherhood of Carpenters and Joiners of America - Local 3054 (Respondents) v. United Co-operative of Ontario and UCO Petroleum Inc. (Interveners) v. Group of Employees (Objectors) (*Dismissed*)

1164-94-R; 1352-94-R; 2818-94-R; 4349-94-R; 2252-95-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Delsan Contracting Ltd., Environmental Abatement Services Inc. (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Environmental Abatement Services Inc. and Delsan Demolition Limited (Respondents) v. Labourers' International Union of North America,

Ontario Provincial District Council and Labourers' International Union of North America, Local 527 (Intervener); United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Delsan Demolition Limited, Environmental Abatement Services Inc., Delsan Environmental Group Inc., Delsan Environmental Services Inc. and Delsan Environmental Group (Respondents); United Brotherhood of Carpenters and Joiners of America, Locals 93 and 2041 (Applicant) v. Delsan Demolition Limited, Environmental Abatement Services Inc., Delsan Environmental Group Inc., Delsan Environmental Services Inc. and Delsan Environmental Group, Philip Environmental Inc. (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 93 and (Applicant) v. Delsan Demolition Limited, Environmental Abatement Services Inc., Delsan Environmental Group Inc., Delsan Environmental Services Inc. and Delsan Environmental Group (Respondents) (*Withdrawn*)

4421-94-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Apex Investigation & Security (Respondent) v. Canadian Security Union (Intervener) (*Withdrawn*)

0334-95-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. 134518 Canada Inc., Rockform Concrete Forming (London) Ltd., M.C. Leal Corporation, Rockform Concrete Ottawa Incorporated, Manuel Leal and Maria J. Oliveira (Respondent) (*Granted*)

1469-95-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. P. & J. Steel Erectors Ltd., Milan Steel Erectors Inc., Mick Joksimovic, Miljan Joksimovic (Respondents) (*Withdrawn*)

2367-95-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. PCL Constructors Eastern Inc. and 18127 Alberta Ltd. (Respondents) (*Withdrawn*)

2433-95-R: The International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Aries Electric Services Ltd. and Acro Electric Services Ltd. (Respondents) (*Endorsed Settlement*)

2657-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. PCL Construction Limited PCL Construction Group Inc., PCL Constructors Inc. PCL Industrial Constructors Inc., PCL Constructors Eastern Inc. PCL Civil Constructors (Canada) Inc., PCL Constructors Prairie Inc. (Respondents) (*Withdrawn*)

2967-95-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 1075777 Ontario Inc., c.o.b. as Lorne's Electric and 291360 Ontario Limited, c.o.b. as Lorne's Electric (Respondents) (*Endorsed Settlement*)

3049-95-R: The International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Baragar & Russell Limited and Systems-Elect Ltd. (Respondents) (*Withdrawn*)

3128-95-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. 933950 Ontario Ltd., Gym-Con Ltd. (Respondents) (*Withdrawn*)

3285-95-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. The McBride Group Inc., 529442 Ontario Limited o/a McBride Group Design and Renovation (Respondents) (*Withdrawn*)

3715-95-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Trio Roofing Ltd., Trio Roofing Systems Inc. (Respondents) (*Granted*)

4016-95-R: International Brotherhood of Painters and Allied Trades, and Glaziers, Local 1819 (Applicant) v. Byrne Glass Enterprises Limited and Raywin Industries Limited (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

3229-95-R: United Steelworkers of America (Applicant) v. Regency Manor Limited (Respondent) (*Granted*)

3234-95-R: United Steelworkers of America (Applicant) v. VS Services Ltd. (Respondent) (*Granted*)

3241-95-R: United Steelworkers of America (Applicant) v. Anker-Holth Limited (Respondent) (*Granted*)

3242-95-R: United Steelworkers of America (Applicant) v. Dunlop Plastics Canada Division of Dunlop (Canada) Inc. Ajax, Ontario (Respondent) (*Granted*)

3243-95-R: United Steelworkers of America (Applicant) v. Wynn's-Precision Canada Ltd. (Respondent) (*Granted*)

3250-95-R: United Steelworkers of America (Applicant) v. Custom Foam Systems Ltd. (Respondent) (*Granted*)

3259-95-R: United Steelworkers of America (Applicant) v. Mitech Plastics Corporation (Respondent) (*Granted*)

3260-95-R: United Steelworkers of America (Applicant) v. Perma Flex (Canada) Inc. (Respondent) (*Granted*)

3261-95-R: United Steelworkers of America (Applicant) v. Marriott Corporation of Canada (Respondent) (*Granted*)

3269-95-R: United Steelworkers of America (Applicant) v. FOAMEX Canada Inc. (Respondent) (*Granted*)

SECTION 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

1385-94-R: Service Employees' International Union, Local 204 (Applicant) v. Citipark, a division of Citicom Inc., and Apcoa Parking Limited (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Terminated*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

4305-94-R: Mr. Louie Lazic (Applicant) v. International Brotherhood of Painters and Allied Trades Local 1824 (Respondent) v. Mike's Painting and Decorating Ltd. (Intervener) (*Withdrawn*)

4643-94-R: Bruce Lepine (Applicant) v. IWA-Canada Local 1-1000 (Respondent) v. Madawaska Hardwood Flooring Inc. (Intervener)

Unit: "all employees of Madawaska Hardwood Flooring Inc. in the Town of Renfrew, save and except foremen, persons above the rank of foreman, office, sales and purchasing staff, persons regularly employed for not more than 24 hours per week, and persons employed under a government sponsored training program" (49 employees in unit) (*Withdrawn*)

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	49
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	45
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of respondent	23
Number of ballots marked against respondent	22
Number of ballots segregated and not counted	4

0512-95-R: Domenic Iannarelli (Applicant) v. Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 666 (Respondent) v. Group 92 Mechanical Inc. (Intervener)

Unit: "all certified journeyman or apprentices as defined in the collective agreement; 2.1 The Association agrees to recognize the Council as the sole collective bargaining agent for all employees of the Contractors as defined in Definition 1.8; 1.8 "Employee" means a qualified and/or Certified Journeyman or Apprentice employed by a Contractor as a plumber, steamfitter, pipefitter, welder, and apprentice thereof, or job foreman" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

3511-95-R: Jerry Sprung (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. E.C. King Contracting (Intervener) (*Granted*)

Unit: "The Employer recognizes the Union as the sole collective bargaining agency for all its employees working on construction projects in the Counties of Grey and Bruce excluding the I.C.I. Sector, save and except foreman and persons above the rank of foreman, office, clerical and quality control staff, engineering staff and mechanics; 1.02 a) The Employer recognizes the Union as the sole collective bargaining agency for all its employees working in its Ready-Mix Divisions at the locations listed in 1(b)(i) below and for all employees working in the Employer's Pits and Quarries (including Asphalt Plant) listed in 1(b)(ii) save and except foremen, batcher-dispatcher, persons above the rank of foreman and batcher-dispatcher, students employed not more than 24 hours per week, office, clerical and engineering staff. Without limiting the foregoing it is agreed that the Dolomite Plant, Quality Control and Shop employees are not included in this Bargaining Unit. (For the purpose of clarity it is agreed that the above noted unit includes truck drivers (including Ready-Mix) in the employ of the Employer). 1.02(b)(i) 1. Grey County 2. Amabel Township 3. Municipality of the Town of Collingwood 4. Saugeen Township 5. Brant Township 1.02(b)(ii) 1. Chappels Pit, between Port Elgin and Southampton on the Saugeen 10th Concession 2. Derby Pit South of Highway 21 on Derby Concession 11, and 3. Sydenham Quarry, 8th Concession Sydenham." (62 employees in unit)

Number of names of persons on revised voters' list	62
Number of persons who cast ballots	54
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	41

3563-95-R: Pine Hill Youth Residence Ltd. (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

3678-95-R; 3679-95-R; 3680-95-R: The Warehouse Drugstore Ltd. c.o.b. as Hy & Zel's (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) (*Withdrawn*)

3700-95-R: Law Cranberry Resort Limited (Applicant) v. Aluminum, Brick & Glass Workers International Union, AFC-CIO-CLC (Respondent) (*Withdrawn*)

3817-95-R: Employees of Zellers Store 263 (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) v. Zellers Inc. (Intervener) (*Dismissed*)

3836-95-R: Karen Reid, Karen Barteaux, Renata Dicarmine and Debra Rose (Applicant) v. Christian Labour Association of Canada (Respondent) v. Gateway Residence of Niagara Inc. (Intervener)

Unit: "all employees of Gateway Residence of Niagara Inc. in the City of Welland, save and except Assistant Program Director, and Program Director and persons above the rank of Program Director" (7 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	0

3844-95-R: Rick Boucher (Applicant) v. Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters (Respondent) v. Seaway News Company Limited (Intervener)

Unit: "all employees of Seaway News Company Limited at St. Catharines, save and except supervisors, foremen and foreladies, office and sales staff and persons above the rank of supervisor, foreman or forelady and students employed during the school vacation period, and persons regularly employed for not more than 24 hours per week" (6 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	0

3886-95-R: The Westin Harbour Castle (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Respondent) (*Withdrawn*)

3889-95-R: Chrysler Canada Ltd. (Applicant) v. National Automobile, Aerospace, Transportation And General Workers Union of Canada (CAW-Canada) (Respondent) (*Withdrawn*)

3893-95-R: McDonnell-Ronald Limousine Service Limited, c.o.b. as Airline Limousine (Applicant) v. Amalgamated Transit Union, Local 1703 (Respondent) (*Withdrawn*)

3947-95-R: Corporation of the Town of Petrolia (Applicant) v. Canadian Union of Public Employees Local 2393 (Respondent) (*Withdrawn*)

3959-95-R: Lorne Lewis/Joe Reed (Applicant) v. IWA - Canada Local 1-700 (Respondent) v. Sherwood Record Management Systems (Intervener)

Unit: "all employees of Sherwood Record Management Systems in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (13 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	8

3996-95-R: Employees of the Hostess Frito-Lay Company (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters (Respondent) v. The Hostess Frito-Lay Company (Intervener)

Unit: "all employees of The Hostess Frito-Lay Company working in Sudbury, Sturgeon Falls and Espanola, save and except supervisors, those above the rank of supervisor and office staff" (17 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	1

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	10
Number of ballots segregated and not counted	1

4127-95-R: Employees of Chinese Family Life Services of Metro Toronto (Applicant) v. International Ladies' Garment Workers' Union (Respondent) v. Chinese Family Life Services of Metro Toronto (Intervener) (*Granted*)

4238-95-R: The Employees of 608507 Ontario Inc. c.o.b. Capital Security and Investigations (Applicant) v. United Steelworkers of America (Respondent) (*Dismissed*)

0029-96-R: Mr. Brent B. Martin (Applicant) v. Labourers' International Union of North America Local 1059 (Respondent) v. Stinson Security Services Ltd. (Intervener) (*Dismissed*)

0215-96-R: Linda Seager (Applicant) v. Ontario Public Service Employees Union and its Local 355 (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0102-96-U: Artree Developments Inc., 860407 Ontario Limited, carrying on business as Rockmount Construction & Masonry (Applicants) v. Labourers' International Union of North America, Local 183, Bricklayers, Masons Independent Union of Canada, Local 1, Dino Puppi, Joseph Alfonsi, Agostino Pulcini, Vittorio Dileta and Angelo Dipaolo (Respondents) (*Endorsed Settlement*)

0145-96-U: Autogene Industries North Bay Inc. c.o.b. as Central Welding & Ironworks (Applicant) v. International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 Toronto, Aaron Murphy and Dan McCormick (Respondent) (*Endorsed Settlement*)

0149-96-U: Artree Developments Inc., 860407 Ontario Limited, carrying on business as Rockmount Construction & Masonry (Applicant) v. Labourers' International Union of North America, Local 183 and Bricklayers, Masons, Independent Union of Canada, Local 1, Dino Puppi, Joseph Alfonsi, Luis Dos Santos, and Henry Lourenco (Respondents) (*Withdrawn*)

0246-96-U: Sarnia Construction Association and Mechanical Contractors Association of Sarnia (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 663 and Robert J. Humphreys (Respondent) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0718-93-U: Cherri Munro (Applicant) v. Hospitality, Commercial and Service Employees Union Local #73 (Respondent) (*Terminated*)

2415-93-U: Peter Simpson (Applicant) v. Communications, Energy and Paperworkers Union, Local 39 and Canadian Pacific Forest Products Limited (Respondents) (*Terminated*)

3292-93-U: Robert Dumeah (Applicant) v. International Association of Bridge, Structural and Ornamental Ironworkers and International Association of Bridge, Structural and Ornamental Ironworkers Local #700 (Respondent) (*Withdrawn*)

3488-93-U: IWA Canada, Local 2693 (Applicant) v. Coretech-Sonoco Limited (Respondent) (*Withdrawn*)

1267-94-U: Mitchell Hamilton (Applicant) v. United Food and Commercial Workers Union Local P114 (Respondent) v. Maple Leaf Prepared Meats (Intervener) (*Terminated*)

2085-94-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Hagi Independent Living Services for Thunder Bay Inc. (Respondent) (*Withdrawn*)

3805-94-U: Angello Malamas (Applicant) v. Metropolitan Chestnut Park Hotel (Respondent) (*Dismissed*)

3977-94-U: International Union, United Plant Guard Workers of America, Local 1956 (Applicant) v. Wackenhut of Canada Limited (Respondent) (*Withdrawn*)

4499-94-U: United Food & Commercial Workers International Union, Local 175/633 (Applicant) v. Handicapped Action Group Incorporated (Respondent) (*Withdrawn*)

0107-95-U: Reginald Fitzgerald (Applicant) v. Alex Keeney and Canadian Automobile Workers, Local 200 (Respondents) (*Terminated*)

0573-95-U: Gary Durocher (Applicant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

0583-95-U: International Brotherhood of Painters and Allied Trades, Local 1824 (Applicant) v. Mike's Painting & Decorating Ltd. (Respondent) (*Withdrawn*)

0585-95-U: IWA Canada Local 1-1000 (Applicant) v. Madawaska Hardwood Flooring Inc. (Respondent) v. Bruce Lepine (Intervener) (*Withdrawn*)

0655-95-U: Marvin MacKinnon (Applicant) v. Amalgamated Transit Union Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Withdrawn*)

0656-95-U: Psychiatric Nursing Assistants, Brockville Psychiatric Hospital, c/o John Shepherd (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Dismissed*)

0804-95-U: Ontario Public Service Employees Union (Applicant) v. Women's Shelter of Georgina, Inc. (Respondent) (*Withdrawn*)

1503-95-U: Leah Mindach (Applicant) v. Metropolitan Toronto Civic Employee's Union, Local 43, Canadian Union of Public Employees, Local 79 (Respondents) v. The Municipality of Metropolitan Toronto (Intervener) (*Withdrawn*)

1575-95-U: Mechanical Contractors Association of Windsor (Applicant) v. Mechanical Contractors Association of Ontario (Respondent) v. Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Intervener) (*Terminated*)

1599-95-U: United Food and Commercial Workers' International Union AFL-CIO-CLC, Local 1000A (Applicant) v. Sobeys Inc. (Respondent) (*Withdrawn*)

1816-95-U: Sherry Lee Eldridge (Applicant) v. Canadian Union of Public Employees and The University of Waterloo (Respondents) (*Terminated*)

1862-95-U: Yvonne Smith and Margil Valdes (Applicants) v. UAW Local 251 (Respondent) v. Itt Automotive a division of ITT Industries Of Canada Ltd. (Intervener) (*Withdrawn*)

1972-95-U: Ian Samuel Jack (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent) v. Christian Labour Association of Canada (Intervener) (*Dismissed*)

2088-95-U: Teamsters Local 647 (Applicant) v. The Hostess Frito-Lay Company (Respondent) (*Terminated*)

2090-95-U: Joy Simon-Walker (Applicant) v. Canadian Union of Public Employees - Local 4900 (Respondent) (*Dismissed*)

2415-95-U; 2598-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. W.R. Industries Limited (Respondent) (*Withdrawn*)

2602-95-U: Robert Joffrey Savage (Applicant) v. London and District Service Workers' Union, Local 220 University Hospital (Respondents) (*Dismissed*)

2605-95-U: The Ontario Nurses' Association (Applicant) v. North Park Nursing Home Ltd. (Respondent) (*Endorsed Settlement*)

2667-95-U: Steven Warren (Applicant) v. International Brotherhood of Boiler Makers and Iron Ship Builders, Blacksmiths, Forgers and Helpers and Union Local 680 (Respondent) v. Port Weller Dry Docks, a division of Canadian Shipbuilding and Engineering Ltd. (Intervener) (*Dismissed*)

2729-95-U: The International Association of Machinists and Aerospace Workers (Applicant) v. Canadian Council of Smoking and Health (Respondent) (*Withdrawn*)

2740-95-U; 3812-95-U: Graphic Communications International Union, Local 517M (Applicant) v. Aylmer Express Limited (Respondent) (*Withdrawn*)

2822-95-U: Ontario Nurses' Association (Applicant) v. Independent Order of Odd Fellows Senior Citizen Homes Inc. (Odd Fellow & Rebekah Home, Barrie) (Respondent) (*Withdrawn*)

2889-95-U: Kimberley A.M. Parkinson (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Respondent) v. A.G. Simpson Co. Ltd. (Intervener) (*Dismissed*)

2936-95-U; 3860-95-U: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent) (*Withdrawn*)

2991-95-U: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Lakeport Beverages, A Division of Lakeport Brewing Corporation (Respondent) (*Withdrawn*)

3110-95-U: Edward A. Bonds (Applicant) v. International Brotherhood of Painters and Allied Trades, Local 205 (Respondent) v. C.H. Heist Ltd. (Intervener) (*Withdrawn*)

3177-95-U: United Steelworkers of America (Applicant) v. 1018433 Ontario Limited. c.o.b. as Michel's Baguette (Respondent) (*Dismissed*)

3180-95-U: William Thomas Sayers (Applicant) v. Henderson Metal Fabricating Co. Ltd., Sheet Metal Workers Local Union 504 (Respondents) (*Dismissed*)

3198-95-U: Floyd Charles-Fridal (Applicant) v. C.U.P.E. Local 2189, and Y.W.C.A. of Metropolitan Toronto (Respondents) (*Withdrawn*)

3213-95-U: Pritam Singh Badyal (Applicant) v. Hemispheres International Mfg. Company (Respondent) v. United Steelworkers of America (Intervener) (*Dismissed*)

3298-95-U: Employees of Ramada Inn (Windsor), members of Teamsters Local 847 Laundry & Linen Drivers and Industrial Workers (Applicant) v. Teamsters Local 847 Laundry & Linen Drivers and Industrial Workers (Respondent) (*Dismissed*)

3379-95-U: Maria Ramos (Applicant) v. The Hotel Employees Restaurant Employees Union, Local 75, and The Delta Chelsea Inn, Toronto (Respondent) v. The Delta Chelsea Inn, Toronto (Intervener) (*Dismissed*)

3400-95-U: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America (Applicant) v. James Demers and Colonial Furniture (Ottawa) Ltd. (Respondents) v. Terry Pleau, on his own

behalf and on behalf of a group of employees of Colonial Furniture Company (Ottawa) Ltd. (Intervener) (*Withdrawn*)

3491-95-U: United Steelworkers of America (Applicant) v. Keele Street Bingo Country Inc. (Respondent) (*Withdrawn*)

3565-95-U: M. Prosper Calixte (Applicant) v. C.U.P.E., Hopital General d'Ottawa (Respondents) (*Withdrawn*)

3585-95-U: Kingston Typographical Union, Local 204, Printing, Publishing & Media Workers Sector of the Communications Workers of America, Local 14018 (Applicant) v. The Kingston Whig-Standard, a Division of Southam Inc. (Respondent) (*Withdrawn*)

3603-95-U: Edward McGimpsey (Applicant) v. The Amalgamated Transit Union, Local 1189 (Respondent) v. The Guelph Transportation Commission, and The City of Guelph (Interveners) (*Dismissed*)

3618-95-U: Vesna Virtanen (Applicant) v. Canadian Union of Public Employees, Local 132 (Respondent) v. Regional Municipality of Durham (Intervener) (*Dismissed*)

3624-95-U; 3968-95-U: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Bay Bloor Executive Suites (Respondent) (*Withdrawn*)

3693-95-U: Manuel das Neves (Applicant) v. National Meats Inc. and United Food & Commercial Workers International Union AFL CIO CLC Local 709-3 (Respondents) (*Dismissed*)

3695-95-U: Ms. Maria Castanheira (Applicant) v. Service Employees' International Union Local 204 (Respondent) (*Dismissed*)

3699-95-U: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Maverick Mechanical Contractors Limited (Respondent) (*Granted*)

3764-95-U: Nick Vukovic (Applicant) v. Power Workers Union - C.U.P.E., Local 1000 (Respondent) v. Ontario Hydro, Lakeview G.S. (Intervener) (*Dismissed*)

3790-95-U: Randy Schleyer (Applicant) v. Total Communication Environment Staff Association (Respondent) v. Total Communication Environment Inc. (Intervener) (*Withdrawn*)

3813-95-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. 461804 Ontario Limited o/a Bramalea Rebuilders (Respondent) (*Dismissed*)

3846-95-U: Tony Urciuoli (Applicant) v. Hotel Plaza II and Union Local 75 H.E.R.E. (Respondents) (*Withdrawn*)

3849-95-U: Aldon C. Bradley (Applicant) v. Mainstream Transportation Services Inc. (Respondent) (*Withdrawn*)

3851-95-U: Canadian Union of Public Employees, Local 2599 (Applicant) v. Sudbury & District Association for Community Living (Respondent) (*Withdrawn*)

3868-95-U: Wayne Barnes (Applicant) v. Canadian Security Union (Respondent) (*Withdrawn*)

3876-95-U: Dan Bolduc (Applicant) v. Harold Stubbart, C.A.W. Rep. Local 199 (Respondent) v. General Motors of Canada Ltd. (Intervener) (*Withdrawn*)

3877-95-U: Douglas Wilkinson Burger (Applicant) v. Dascan Consulting Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local Union 353 (Intervener) (*Withdrawn*)

3892-95-U: United Steelworkers of America (Applicant) v. Loeb Club Plus Manotick Mews and/or 752283 Ontario Inc. (Respondent) (*Withdrawn*)

3943-95-U: David E. Smith et al (see schedule “B”) (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Crown in Right of Ontario as represented by Management Board of Cabinet (Intervener) (*Dismissed*)

3957-95-U: Penny Sue Stewart (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Crown in Right of Ontario as represented by Management Board of Cabinet (Intervener) (*Withdrawn*)

3969-95-U: Canadian Union of Public Employees, Local 11 (Applicant) v. North York Hydro (Respondent) (*Withdrawn*)

3973-95-U: United Steelworkers of America (Applicant) v. Gourmet Baker Inc. (Respondent) (*Withdrawn*)

4012-95-U: Alexander Airlie (Applicant) v. Amalgamated Transit Union, Local 113, (Respondent) v. Toronto Transit Commission (Intervener) (*Withdrawn*)

4021-95-U: Victoria Young-Kerr (Applicant) v. Goodwill Industries, Union Local 847 (Respondents) (*Withdrawn*)

4028-95-U: Service Employees' International Union Local 204 (Applicant) v. Sisters of St. Joseph for the Diocese of Toronto in Upper Canada (Respondent) (*Withdrawn*)

4034-95-U: Jose Resendes (Applicant) v. Omstead Food's & U.F.C.W. Local 459 (Respondents) (*Dismissed*)

4044-95-U: Iva Haughton (Applicant) v. SEIU Local 204 (Respondent) (*Withdrawn*)

4045-95-U: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Pro Mark Aluminum Ltd. (Respondent) (*Withdrawn*)

4055-95-U: David A. Conroy (Applicant) v. Canadian Union of Public Employees, Local 503 (Respondent) (*Dismissed*)

4073-95-U: Firoz Ramji (Applicant) v. Westbury Howard Johnson Plaza Hotel (Respondent) (*Dismissed*)

4075-95-U: Dulce Dos Santos (Applicant) v. Prime Poultry Products (Respondent) (*Dismissed*)

4085-95-U: Vincent Surdyk (Applicant) v. CAW-TCA Canada (Respondent) v. Exide Canada Inc. (Intervener) (*Withdrawn*)

4086-95-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. The Garden Market (Respondent) (*Withdrawn*)

4095-95-U: Keyur (Kay) Joshi (Applicant) v. United Parcel Service (Respondent) (*Withdrawn*)

4098-95-U: Christian Labour Association of Canada (Applicant) v. Maple Engineering and Construction Canada Limited (Respondent) (*Withdrawn*)

4128-95-U: Maurice Bertrand (Applicant) v. Tim Young of Union Local S.C.E.U. Local 272 of the Ottawa Roman Catholic Separate School Board (Respondent) (*Dismissed*)

4129-95-U: United Steelworkers of America (Applicant) v. Chapters Inc., c.o.b. as The Book Company (Respondent) (*Withdrawn*)

4130-95-U: June Lynden (Applicant) v. Sunnybrook Health Science Centre (Respondent) (*Dismissed*)

4141-95-U; 4200-95-U; 4227-95-U: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario, as represented by the Management Correctional Services (Respondent); Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario (Minister of the Solicitor General and Correctional Services) with respect to Maplehurst, Don Jail, Guelph Correctional Institute, Elgin Middlesex Detention Centre,

and - Niagara Detention Centre (Respondent); The Crown in Right of Ontario - Guelph Correctional Centre, Elgin Middlesex Detention Centre, Niagara Detention Centre, Toronto Jail and Maplehurst Correctional Centre and Detention Centre (Applicant) v. The Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

4146-95-U: Dean S.K. Holmes (Applicant) v. Susan Milton (Respondent) (*Dismissed*)

4166-95-U: The Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses, Waterloo Region Branch (Respondent) (*Withdrawn*)

4172-95-U: The Crown in Right of Ontario as represented by Management Board of Cabinet (Applicant) v. The Ontario Public Service Employees Union and John Mills (Respondent) (*Withdrawn*)

4175-95-U: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario as represented by Ministry of Community and Social Services (Respondent) (*Terminated*)

4189-95-U: United Steelworkers of America (Applicant) v. J.P. Murphy Inc. c.o.b. as Tim Hortons (Respondent) (*Withdrawn*)

4231-95-U: Ontario Public Service Employees Union (Applicant) v. The Crown in right of Ontario (Ministry of the Attorney General) (Respondent) (*Withdrawn*)

0014-96-U: Danny McLean (Applicant) v. Ontario Public Servants Employees Union (Respondent) (*Dismissed*)

0057-96-U: William J. Viveen (Applicant) v. United Steelworkers of America and Babcock & Wilcox Canada (Respondents) (*Dismissed*)

0058-96-U: Thereasa Boyer (Applicant) v. CUPE Local 1480 and Frontenac County Board of Education (Respondents) (*Withdrawn*)

0075-96-U: William D. Lights (Applicant) v. United Food and Commercial Workers Local 1000A, Sunnybrook Foods Ltd. (Respondents) (*Dismissed*)

0164-96-U: Ontario Public Service Employees Union Local 108 (Applicant) v. The Government of Ontario, The Ministry of Solicitor General and Correctional Services, Elgin-Middlesex Detention Centre (Respondent) (*Dismissed*)

0296-96-U: Vernon Brewster (Applicant) v. YCC 290 (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

0163-96-M: Henry Tomsett, Robert Thoms, Ron Young, Gregory O'Donnell, Hugh Gillies, Gregory Chaffey, John Caskanette, Leonard Crausen, and Richard Hansen (Applicant) v. International Brotherhood of Electrical Workers (Respondent) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

3780-95-M: Janis Elizabeth Easton (Applicant) v. OPSEU Local #436, Rideau Regional Centre (Respondents) (*Withdrawn*)

3807-95-M: Rita Vermeer (Applicant) v. United Food & Commercial Workers International Union, Local 175, Caressant Care, Listowel (Respondents) (*Withdrawn*)

TRUSTEESHIP

2741-94-T: Hotel Employees and Restaurant Employees International Union (Applicant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) (*Granted*)

4225-95-T: International Brotherhood of Electrical Workers (Applicant) v. International Brotherhood of Electrical Workers, Local 1788 (Respondent) (*Terminated*)

JURISDICTIONAL DISPUTES

0575-95-JD: Iron Workers District Council of Ontario International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. Asea Brown Boveri Inc., International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Locals 128 and 555 (Respondents) (*Dismissed*)

1677-95-JD: Labourers' International Union of North America, Local 247 (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 249 and Ellis-Don Construction Ltd. and AJV Masonry Ltd. (Respondents) (*Granted*)

3688-95-JD: Labourers' International Union of North America, Local 506 (Applicant) v. Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America and Rili Construction Weston Limited (Respondents) v. General Contractors' Section, Toronto Construction Association (Intervener) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1192-94-M: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (Applicant) v. Thomson Newspapers Company Limited (Guelph Mercury Division) (Respondent) (*Withdrawn*)

2841-95-M: Ontario Nurses' Association (Applicant) v. Perth & Smiths Falls District Hospital (Respondent) (*Endorsed Settlement*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0056-95-OH: David Wayne Wheadon (Applicant) v. Hemlo Gold, Golden Giant Mine (Respondent) (*Withdrawn*)

0427-95-OH: David Jones (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

1389-95-OH: Mario Lamanna (Applicant) v. Municipality of Metropolitan Toronto (Respondent) (*Dismissed*)

1502-95-OH: Leah Mindach (Applicant) v. Metro Parks and Culture (Respondent) v. Metropolitan Toronto Civic Employee's Union, Local 43, Canadian Union of Public Employees, Local 79 (Interveners) (*Withdrawn*)

2690-95-OH: Daniel James Gonder (Applicant) v. Pan Oston Ltd. (Respondent) (*Dismissed*)

3089-95-OH: Valerie Homolla (Applicant) v. Sue Bass and The Corporation of the City of Mississauga (Respondent) (*Withdrawn*)

3299-95-OH: William Borgschulze (Applicant) v. Die-Metric Tool Inc. (Respondent) (*Granted*)

3921-95-OH: Ashley Cornelius (Applicant) v. Northumberland Tire Sales (Respondent) (*Withdrawn*)

3970-95-OH: Michael Wilkinson (Applicant) v. Ian A. MacKenzie Limited (Respondent) (*Withdrawn*)

4014-95-OH: Ted Manchavrakos (Applicant) v. Pioneer Property Group and Nova Housekeeping Systems Inc. (Respondents) (*Withdrawn*)

4050-95-OH: Wayne R. Welsh (Applicant) v. Fab Tech (Respondent) (*Withdrawn*)

4142-95-OH: David Hall (Applicant) v. Nemato Composites Inc. (Respondent) (*Withdrawn*)

4151-95-OH: Mark Misiuda (Applicant) v. Medallion Meat Products Inc. (Respondent) (*Withdrawn*)

4196-95-OH: Barbara G. Nyke (Applicant) v. Polish Immigrant & Community Services (Respondent) (*Withdrawn*)

0047-96-OH: Paul A. Keyes (Applicant) v. AWL Steego (Respondent) (*Terminated*)

COLLEGES COLLECTIVE BARGAINING ACT

3748-94-U: Ontario Public Service Employees Union and its Local 245 (Applicant) v. Ontario Council of Regents for Colleges of Applied Arts and Technology, Board of Governors of Sheridan College, Mary Hofstetter and Damian Borrelli (Respondents) (*Withdrawn*)

HOSPITAL LABOUR DISPUTES ARBITRATION ACT (Unfair Labour Practice)

3729-95-U: Village Park Inc. c.o.b. as Village Park Retirement Home (Applicant) v. Service Employees International Union, Local 204 (Respondent) (*Terminated*)

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

4181-95-U; 4221-95-U: The Crown in Right of Ontario as represented by Ministry of Solicitor General and Correctional Services (Applicant) v. Ontario Public Service Employees Union and Bernard Martin and others (Respondent); Ontario Public Service Employees Union (Applicant) v. Ministry of the Solicitor General and Correctional Services (Respondent) (*Withdrawn*)

4185-95-U: Ontario Public Service Employees Union (Applicant) v. Crown in right of Ontario (Corrections - Ottawa - Carleton Detention Centre) (Respondent) (*Withdrawn*)

4204-95-U: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario (Respondent) (*Terminated*)

4222-95-U: The Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario, as represented by The Ministry of the Solicitor General and Correctional Services and Jude Lake, Andie Rankin, Mark Mei, Tony Hocking, Ed Tighe, Wally Kurczak (Respondent) (*Withdrawn*)

4243-95-U: The Crown in right of Ontario as represented by the Ministry of Health (Applicant) v. The Ontario Public Service Employees Union and Michael Laporte and Richard Coburn and OPSEU Local 531 (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

4416-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Javid Construction Management Limited (Respondent) (*Withdrawn*)

0681-94-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Catalytic Maintenance Inc., Delta Catalytic Plant Services Ltd. (Respondent) v. Sheet Metal Workers' International Association, Local 539 (Intervener) (*Withdrawn*)

0692-94-G: Iron Workers District Council of Ontario, International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. K and K Services, Keith Kawase, Finer Steel (Respondents) (*Withdrawn*)

1163-94-G; 1353-94-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Delsan Contracting Ltd. and Environmental Abatement Services Inc. (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 527 (Intervener); The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Delsan

Demolition Limited (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 527 (Intervener) (*Withdrawn*)

1572-94-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Delta Catalytic Industrial Services Limited (Respondent) v. General Presidents' Maintenance Committee for Canada Petro-Canada (Interveners) (*Terminated*)

4330-94-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Rockform Concrete Forming (London) Ltd., 134518 Canada Inc., 447774 Ontario Ltd. (Respondents) (*Granted*)

0584-95-G: International Brotherhood of Painters and Allied Trades, Local 1824 (Applicant) v. Mike's Painting & Decorating Ltd. (Respondent) (*Withdrawn*)

1164-95-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, and United Brotherhood of Carpenters and Joiners of America, Locals 785 and 2050 (Applicants) v. Con-Ex Inc. (Respondent) (*Dismissed*)

1470-95-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Milan Steel Erectors Inc., Mick Joksimovic, Miljan Joksimovic (Respondents) (*Withdrawn*)

1646-95-G; 1715-95-G: Labourers' International Union of North America, Local 597 (Applicant) v. Ellis-Don Ltd. (Respondent) (*Withdrawn*)

2388-95-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. PCL Constructors Eastern Inc., and 18127 Alberta Ltd. (Respondents) (*Withdrawn*)

2430-95-G: The International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Aries Electric Services Ltd. and Acro Electric Services Ltd. (Respondents) (*Endorsed Settlement*)

2772-95-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rili Construction Weston Limited (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener) (*Withdrawn*)

2935-95-G; 3861-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent) (*Withdrawn*)

2968-95-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 1075777 Ontario Inc., c.o.b. as Lorne's Electric, 291360 Ontario Limited, c.o.b. as Lorne's Electric (Respondents) (*Endorsed Settlement*)

3035-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. Peter Kiewit Sons Co. Ltd. (Respondent) v. The National Capital Roadbuilders Association (Intervener) (*Withdrawn*)

3048-95-G: The International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Baragar & Russell Limited and Systems-Elect Ltd. (Respondents) (*Endorsed Settlement*)

3151-95-G: The International Brotherhood of Painters and Allied Trades Local 194 (Applicant) v. National Painting & Decorating (Respondent) (*Withdrawn*)

3166-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. C.M.E. Rentals Ltd. (Respondent) (*Endorsed Settlement*)

3364-95-G: Sheet Metal Workers' International Association Local Union No. 285 (Applicant) v. Applewood Air Conditioning Ltd. (Respondent) (*Granted*)

3383-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. C. H. Heist Ltd. (Respondent) (*Granted*)

3496-95-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Eton Construction Limited (Respondent) (*Withdrawn*)

3649-95-G; 3650-95-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Applicant) v. PCL Constructors Eastern Inc. (Respondent) (*Withdrawn*)

3660-95-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc. (Respondent) (*Terminated*)

3674-95-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Jeti Heating Systems Co. Ltd. (Respondent) (*Withdrawn*)

3685-95-G: Labourers' International Union of North America, Local 607 (Applicant) v. Lebrun Northern Contracting Ltd. (Respondent) (*Withdrawn*)

3746-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Viba Limited (Respondent) (*Endorsed Settlement*)

3748-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. 783430 Ontario Ltd. (Respondent) (*Endorsed Settlement*)

3752-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pro-Con Curb & Sidewalk Ltd. (Respondent) (*Granted*)

3826-95-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Torchline Corporation (Respondent) (*Granted*)

3925-95-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Thomas Fuller Construction Co. (1958) Ltd. (Respondent) (*Granted*)

3977-95-G: United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicant) v. Wilcox Interiors Inc. (Respondent) (*Endorsed Settlement*)

3979-95-G: Sheet Metal Workers' International Association Local 235 (Applicant) v. Cardinal Air Conditioning Ltd. (Respondent) (*Withdrawn*)

3993-95-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Barclay Commercial Floors (Respondent) (*Withdrawn*)

4015-95-G: International Brotherhood of Painters and Allied Trades, and Glaziers, Local 1819 (Applicant) v. Byrne Glass Enterprises Limited and Raywin Industries Limited (Respondents) (*Withdrawn*)

4032-95-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Univex Canada Limited (Respondent) (*Withdrawn*)

4043-95-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 786 (Applicant) v. Delta Catalytic Engineering and Construction Limited (Respondent) (*Withdrawn*)

4046-95-G: International Union of Bricklayers and Allied Craftsmen, Local 25 (Applicant) v. Gasparotto-Panontin Construction Ltd. (Respondent) (*Withdrawn*)

4047-95-G: Labourers' International Union of North America, Local 506 (Applicant) v. Minuk Contracting (Respondent) (*Withdrawn*)

4048-95-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Siero Masonry Inc. (Respondent) (*Withdrawn*)

4057-95-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. 9010-4803 Quebec Inc. c.o.b. as Denis St. Jean (Respondent) (*Withdrawn*)

4084-95-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. 90201377 Quebec Inc. c.o.b. as Triple A Masonry (Respondent) (*Endorsed Settlement*)

4093-95-G: Construction Workers Local 6, CLAC (Applicant) v. Schaible Electric Ltd. (Respondent) (*Endorsed Settlement*)

4105-95-G: International Brotherhood of Electrical Workers, Local 1788 (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

4120-95-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. K & M Construction Ltd. (Respondent) (*Withdrawn*)

4164-95-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dominion Caulking Co. Ltd. (Respondent) (*Withdrawn*)

4170-95-G: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 598 (Applicant) v. Blandford Industrial Insulation (Respondent) (*Endorsed Settlement*)

4180-95-G: Quality Control Council of Canada (Applicant) v. Graff Diamond Products NDT Division (Respondent) (*Endorsed Settlement*)

4191-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. Adesso Construction Limited (Respondent) (*Endorsed Settlement*)

4197-95-G: Labourers' International Union of North America, Local 506 (Applicant) v. Ciro Excavating & Grading Ltd. (Respondent) (*Withdrawn*)

0024-96-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. M.M.K. Enterprises Steel Placing (Respondent) (*Withdrawn*)

0038-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Applicant) v. Maxwell Plumbing & Heating Co. Ltd. (Respondent) (*Withdrawn*)

0055-96-G: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. 1095985 Ontario Limited o/a Urban Interior Contracting (Respondent) (*Endorsed Settlement*)

0087-96-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Gottardo Contracting (1980) Inc. (Respondent) (*Withdrawn*)

0090-96-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Mar-Lan Construction Ltd. (Respondent) (*Withdrawn*)

0094-96-G: Millwright District Council of Ontario on its own behalf and on behalf of its Local 1410 (Applicant) v. Jones Power Company Limited (Respondent) (*Withdrawn*)

0098-96-G: International Union of Elevator Constructors, Local 50 (Applicant) v. CEE Elevator Service Ltd. (Respondent) (*Withdrawn*)

0182-96-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Ellis Don Limited (Respondent) v. Sheet Metal Workers International Association Local 30 (Intervener) (*Withdrawn*)

0184-96-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. CamSteel Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2165-87-U: Kazimir Cigan (Applicant) v. Canadian Autoworkers Union, Local 444 (Respondent) (*Denied*)

1970-89-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Ryder Concrete Forming Specialists Ltd. (Respondent) v. Group of Employees (Objectors) (*Denied*)

1309-91-U; 1310-91-U: Reuben Gooden (Applicant) v. L. Brenders/Ivor Roberts (Respondent) (*Denied*)

0558-94-R: Amalgamated Transit Union, Local 1572 (Applicant) v. McDonnell-Ronald Limousine Service Limited c.o.b. as Airline Limousine (Respondent) v. Samir Choghri, John Koutrouliotis, Nick Papaioannou and Phil Kardaras (Intervener) (*Denied*)

4200-94-R: Ontario Liquor Boards Employees' Union (Applicant) v. Blue Water Bridge Duty Free Shop Inc. (Respondent) (*Denied*)

4302-94-U: Guillaume Kibale (Applicant) v. l'Association des professeur(e)s à temps partiel de l'Université d'Ottawa (Respondent) v. L'Université d'Ottawa (Intervener) (*Dismissed*)

0996-95-R: Ram Seenanan, on his behalf and on behalf of a group of employees of Metro Taxi Ltd. c.o.b. as Capital Taxi, operating as taxi owners and/or taxi drivers (Applicant) v. United Steelworkers of America (Respondent) v. Metro Taxi Ltd. c.o.b. as Capital Taxi (Intervener) (*Denied*)

1334-95-R: Graphic Communications International Union Local 517M (Applicant) v. The Aylmer Express Ltd. (Respondent) (*Withdrawn*)

2181-95-U; 2182-95-R: United Steelworkers of America (Applicant) v. ASM Dispensaries Limited c.o.b. as Shoppers Drug Mart (Respondent) v. Group of Employees (Objectors) (*Denied*)

2517-95-U: Beverley A. Wright (Applicant) v. The Ontario Public Service Employees Union and Ontario Public Service Staff Union (Respondent) (*Denied*)

2983-95-R: Peter T. Sherk (Applicant) v. Communications, Energy and Paperworkers Union of Canada Local 91-0, Toronto Typographical Union (Respondent) (*Granted*)

3216-95-OH: Istvan Banyai (Applicant) v. Ever-Reddy Duplicating Service Inc. (Respondent) (*Dismissed*)

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1996

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2282-92-R: Labourers International Union of North America, Local 183 (Applicant) v. Associated Paving Company Ltd. and/or Capobianco Management Limited and/or Associated Contracting Inc. and/or Rosalucia Landscaping Inc. and/or The Core Group Inc. and/or Capo Contracting Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of Associated Paving Company Ltd., Capobianco Management Limited, Associated Contracting Inc., Rosalucia Landscaping Inc., The Core Group Inc. and Capo Contracting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Associated Paving Company Ltd., Capobianco Management Limited, Associated Contracting Inc., Rosalucia Landscaping Inc., The Core Group Inc. and Capo Contracting Inc. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (34 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2283-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Associated Paving Company Ltd. and/or Capobianco Management Limited and/or Associated Contracting Inc. and/or Rosalucia Landscaping Inc. and/or The Core Group Inc. and/or Capo Contracting Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Associated Paving Company Ltd., Capobianco Management Limited, Rosalucia Landscaping Inc., The Core Group Inc. and Capo Contracting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of Associated Paving Company Ltd., Capobianco Management Limited, Rosalucia Landscaping Inc., The Core Group Inc. and Capo Contracting Inc. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0001-95-R: United Food and Commercial Workers International Union, AFL-CIO, CLC (Applicant) v. Genesis Meat Packers Inc. (Respondent)

Unit: "all employees of Genesis Meat Packers Inc. in the Municipality of Metropolitan Toronto, save and except office and clerical staff, foremen and persons above the rank of foreman" (27 employees in unit)

Bargaining Agents Certified Subsequent to Vote

2821-95-R: Ontario Public Service Employees Union (Applicant) v. Royal Ottawa Health Care Group/Services de Santé Royal Ottawa, The Institute of Mental Health Research (Respondents) v. Canadian Union Of Public Employees (Intervener)

Unit #1: "all paramedical employees of the Royal Ottawa Health Care Group/Services de Santé Royal Ottawa in the Regional Municipality of Ottawa-Carleton, save and except supervisors, co-ordinators, discipline leaders,

managers and discipline leaders, chief certified prosthetist, senior physiotherapist and manager Workwise Physiotherapy Clinic, Clinical Co-ordinator Robin Easey Centre, Manager of PACE, persons employed in the Information Services Department and persons above the rank of supervisor, co-ordinator, discipline leader, manager and discipline leader, chief certified prosthetist, senior physiotherapist and manager Workwise Physiotherapy Clinic, Clinical Co-ordinator Robin Easey Centre, Manager of PACE and any persons for whom any trade union held bargaining rights as of October 24, 1995,” (349 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of persons who cast ballots	285
Number of ballots marked in favour of applicant	150
Number of ballots marked against applicant	84
Number of ballots segregated and not counted	51

Unit #2: “all research employees of The Institute of Mental Health Research in the Regional Municipality of Ottawa-Carleton, save and except supervisors and persons above the rank of supervisor” (349 employees in unit)

Number of persons who cast ballots	285
Number of ballots marked in favour of applicant	150
Number of ballots marked against applicant	84
Number of ballots segregated and not counted	51

3586-95-R: Kingston Typographical Union, Local 204, Printing, Publishing & Media Workers Sector of the Communications Workers of America, Local 14018 (Applicant) v. The Kingston Whig-Standard, a Division of Southam Inc. (Respondent)

Unit: “all employees of The Kingston Whig-Standard, a Division of Southam Inc. in Kingston regularly employed for not more than twenty-four hours per week in the Advertising and Reader Sales Departments, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation periods” (16 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	13
Number of persons listed as in dispute	0
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	11
Number of segregated ballots cast by persons whose names appear on voter’s list	0
Number of segregated ballots cast by persons whose names do not appear on voters’ list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

3918-95-R: Ontario Public Service Employees Union (Applicant) v. The Penetanguishene General Hospital (Respondent)

Unit: “all office and clerical employees of The Penetanguishene General Hospital in the Town of Penetanguishene, save and except supervisors and persons above the rank of supervisor, personnel secretary, secretary to executive director, and campaign office manager/personnel secretary” (20 employees in unit)

Number of names of persons on revised voters’ list	25
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	15
Number of segregated ballots cast by persons whose names appear on voter’s list	2
Number of segregated ballots cast by persons whose names do not appear on voters’ list	1
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	2

3976-95-R: Canadian Union of Public Employees (Applicant) v. Maison Mère des Soeurs de la Charité d'Ottawa (Respondent)

Unit: "all lay employees of the Maison-Mère des Soeurs de la Charité d'Ottawa, save and except Head Cook, Assistant Head Cook, Supervisors, persons above the rank of Supervisor, clerical staff, registered nurses, graduate nurses and any persons for whom a trade union held bargaining rights on the date of application" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

4030-95-R: Service Employees Union, Local 478 (Applicant) v. Anson General Hospital (Respondent)

Unit: "all office and clerical employees of Anson General Hospital, in Iroquois Falls, Ontario, save and except Secretary to the Executive Director, Secretary to the Business Manager, Secretary to the Director of Nursing, Department Heads and persons above the rank of department head, and persons in bargaining units for which any trade union held bargaining rights as of February 14, 1996" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

4107-95-R: Communications, Energy and Paperworkers Union, Local 87-M, Southern Ontario Newspaper Guild (Applicant) v. The Spectator, A Division of Southam Inc. (Respondent)

Unit: "all employees of The Spectator, a Division of Southam Inc., in the Advertising Department in the City of Hamilton and the City of Burlington, save and except Marketing Unit Managers, Tele-sales Supervisor, Key Account Manager, Ad Services Manager, Sales Planning Manager and all those above such ranks, secretaries to the Vice-President, Advertising Sales and Marketing Unit Managers and any persons for whom a trade union held bargaining rights as of March 8, 1996" (77 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	94
Number of persons who cast ballots	78
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	62
Number of segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	38
Number of ballots marked against applicant	24
Number of ballots segregated and not counted	16

4173-95-R: Public Service Alliance of Canada (Applicant) v. University of Western Ontario (Respondent)

Unit: "all registered graduate students of the University of Western Ontario in the City of London employed pursuant to a Graduate Teaching Assistantship for not more than 24 hours per week" (991 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	1016
Number of persons who cast ballots	499
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	494
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	267
Number of ballots marked against applicant	227
Number of ballots segregated and not counted	5

0002-96-R: Ontario Public Service Employees Union (Applicant) v. St. Joseph's Hospital & Health Centre (Respondent)

Unit: "all office and clerical employees of St. Joseph's Hospital & Health Centre in the City of Peterborough, save and except supervisors and those above the rank of supervisor, Human Resources Secretaries, Human Resources Officer, Labour Relations Officer, Executive Secretary/Board Secretary, Administrative Secretary, Librarian, students employed for the school vacation, and any persons for whom a trade union held bargaining rights as of April 1, 1996" (86 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	86
Number of persons who cast ballots	64
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	61
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

0023-96-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Central Ontario Drywall (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Central Ontario Drywall in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, all carpenters and carpenters' apprentices in the employ of Central Ontario Drywall in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non- working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	0

0026-96-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Signature Building Maintenance Systems Limited (Respondent)

Unit: "all employees of Signature Building Maintenance Systems Limited employed at Queen's Park complex in Toronto, Ontario, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (75 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	46
Number of persons listed as in dispute	0
Number of persons who cast ballots	54
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	43
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	11
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	40
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	10

0083-96-R: IWA - Canada (Applicant) v. Gogama Forest Products Ltd. (Respondent) v. Gogama Forest Products Employees Association (Intervener)

Unit: "all employees of Gogama Forest Products Ltd. at its Wood Fibre Processing Plant and work sites in the yard, located at or near the C.N. siding of Ostrom, Hwy. 560 in Westbrook Township, save and except supervisor, persons above the rank of supervisor, office and sales staff" (33 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	19
Number of ballots marked in favour of intervener	9

0103-96-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Canadian Pacific Hotels Corporation (Chateau Laurier Hotel) (Respondent)

Unit: "all security officers employed by Canadian Pacific Hotels Corporation at the Chateau Laurier Hotel in the City of Ottawa, save and except the Chief of Security, persons above the rank of Chief of Security, and any students employed during the school vacation periods," (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

0108-96-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Quinte Learning Centre Ltd. (Respondent)

Unit: "all employees of the Quinte Learning Centre Ltd. in the Town of Whitby, save and except managers and those above the rank of manager" (18 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	1

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

0130-96-R: Communications, Energy & Paperworkers Union of Canada (CEP) (Applicant) v. BASF Canada Inc. (Respondent)

Unit: "all employees of BASF Canada Inc. in the City of Windsor save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and those persons for whom any trade union held bargaining rights as of April 11, 1996" (32 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	31
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	13

0137-96-R: Ontario Nurses' Association (Applicant) v. Wildwood Care Centre Inc. (Respondent)

Unit: "all employees employed as Registered Nurses, Graduate Nurses, Registered Practical Nurses, Health Care Aides and Nurses' Aides at Wildwood Nursing and Retirement Home in the Town of St. Marys, in the Township of Perth, save and except the Director of Care and any persons above the rank of Director of Care" (46 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	4

0160-96-R: United Steelworkers of America (Applicant) v. Wackenhut of Canada Ltd. (Respondent) v. International Union, United Plant Guard Workers of America, Local 1956 (Intervener)

Unit: "all security guards of Wackenhut Canada Ltd. at 120 Brant Avenue, 112 Tollgate Road, 280 North Park Street, 627 Colborne, 52 Clench Avenue, 141 Banbury Road, 97 Ten Avenue, 238 Brantwood Park Road, 10 Blackfriar Lane, 60 Ashgrove, 41 Ellenson Drive, 135 George 54 Ewing Drive, 106 Chestnut, 723 Colborne, 365 Rawdon Street, 34 Norman, 292 Mt. Pleasant, 56 Grand, 68 North Park, 36 Baxter Street, 33 White Oaks, 62 Queensway Drive, 347 Erie Avenue, 265 Rawdon Street, 21 Preston Boulevard, 105 Rawdon Street, 15 Church Street West, 21 Brant School Road, 40 Morton, 60 Tecumseh, 70 King, 10 Wade, 43 Cambridge, 61 Sherwood Drive, 16 Morrell, 40 Richmond, 51 Woodman and 70 Easton, 35 Alexander, 26 Park Avenue, 161 Harley Road, 6 Maple Avenue North, 231 Grand River North, 68 Bethel Road, 107 Silver Street, 7 Broadway East, 2 Ball Street, 522 Glen Morris Road East, 1425 Bishop Road, 667 Mt. Pleasant Road, 3 College Street in the County of Brant; and 460 Speedvale, 52 Royal Road in the City of Guelph; and 152 Berryman Avenue in the City of St. Catharines; and 435 King Street North in the City of Waterloo; save and except Site Supervisors or their designates, persons above the rank of Site Supervisor or their designate, Guard Inspector or their designate, office, clerical and sales staff and students employed during the school vacation period" (44 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	48
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Number of persons listed as in dispute	0
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	1

0174-96-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. CAA Auto Club & Travel Agency (Respondent)

Unit: "all employees of CAA Auto Club & Travel Agency in the City of Chatham, save and except supervisors and those above the rank of supervisors" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

0195-96-R: Graphic Communications International Union, Local 500M (Applicant) v. McBee Systems of Canada Inc. (Respondent)

Unit: "all employees of McBee Systems of Canada Inc. in the Municipality of Metropolitan Toronto, save and except non-working foremen, persons above the rank of non-working foremen, office and sales staff, and persons covered by the existing collective agreement with the Applicant." (23 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	0

0205-96-R: Communications, Energy and Paperworkers Union of Canada, Local 87-M Southern Ontario Newspaper Guild (Applicant) v. Arnold A. Auguste Associates Limited o/a Share Communications (Respondent)

Unit: "all employees of Arnold A. Auguste Associates Limited o/a Share Communications in the Municipality of Metropolitan Toronto, save and except the Publisher and the Managing Editor and persons above the rank of Publisher and Managing Editor and the Confidential Assistant to the Publisher" (18 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0212-96-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880 (Applicant) v. N. Tepperman Limited (Respondent)

Unit: "all employees of N. Tepperman Limited at Sarnia, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2

0213-96-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880 (Applicant) v. N. Tepperman Limited (Respondent)

Unit: "all employees of N. Tepperman Limited at Chatham, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2

0268-96-R: Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. Watts Industries (Canada) Inc. (Respondent)

Unit: "all employees of Watts Industries (Canada) Inc. in the City of Burlington, save and except secretarial staff, sales staff, engineering staff, accounting staff, material information systems staff, and those above the rank of lead hand" (38 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	52
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	10
Number of ballots segregated and not counted	5

0279-96-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Bauer Industries Ltd. (Respondent) v. Bauer Industries Limited Employees' Association (Intervener)

Unit: "all employees of Bauer Industries Ltd. at plant No. 1, plant No. 2 and plant No. 4, save and except foremen, persons above the rank of foremen, office staff and persons regularly employed for not more than twenty-four hours per week" (160 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	149
Number of persons who cast ballots	147
Number of ballots marked in favour of applicant	123

Number of ballots marked in favour of intervener

24

0283-96-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Tyton Group (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of The Tyton Group in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of The Tyton Group in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman ” (2 employees in unit)

Number of names of persons on revised voters’ list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

0297-96-R: Canadian Union of Public Employees (Applicant) v. Chimo Youth and Family Services, Inc. (Respondent)

Unit: “all employees of Chimo Youth and Family Services, Inc. in or out of the Town of Lindsay, save and except supervisors and persons above the rank of supervisor” (28 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	29
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	25
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	9

0336-96-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. LOEB Princess Street (Respondent)

Unit: “all part-time employees regularly employed for less than 24 hours per week, of LOEB, 1225 Princess Street, in the City of Kingston, save and except Department Managers, persons above the rank of Department Manager, office and clerical staff, and members of the United Food and Commercial Workers International Union, Local 633” (103 employees in unit)

Number of names of persons on revised voters’ list	97
Number of persons who cast ballots	77
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	76
Number of segregated ballots cast by persons whose names appear on voter’s list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	53
Number of ballots marked against applicant	22

0337-96-R: United Food and Commercial Workers International Union Local 175 (Applicant) v. Thrifty Canada Ltd. (Respondent)

Unit: “all employees of Thrifty Canada Ltd. at its corporate locations in the Regional Municipality of Metropolitan Toronto, and the Town of Richmond Hill, save and except supervisors, employees above the rank of supervisor, office, clerical and casual employees” (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

0376-96-R: United Steelworkers of America (Applicant) v. Tilley of Canada Limited (Respondent)

Unit: "all employees of Tilley of Canada Limited in the Municipality of Metropolitan Toronto, save and except Forepersons and persons above the rank of Foreperson, office, clerical and sales staff" (75 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	87
Number of persons who cast ballots	95
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	75
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	13
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	56
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	20

0430-96-R: Canadian Union of Professional Security Guards (Applicant) v. Greenaway Security Services Limited (Respondent)

Unit: "all employees of Greenaway Security Services Limited (G.S.S.) employed at the Dundas Transfer Station, Olympic Street and Coutes Drive, Dundas; Mountain Transfer Station, Upper Ottawa and Kilbride Streets Hamilton and Kenora Transfer Station; Kenora Street Hamilton in the Municipality of Hamilton Wentworth save and except Patrol Supervisors and persons above the rank of Patrol Supervisor," (7 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	2

0451-96-R: London and District Service Workers' Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Durham Memorial Hospital (Respondent)

Unit: "all Registered Nurses employed in a nursing capacity by Durham Memorial Hospital in the Town of Durham, save and except the Pharmacy Nurse/Unit Facilitator and persons at or above the rank of Pharmacy Nurse/Unit Facilitator," (16 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0481-96-R: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 880 (Applicant) v. Nartech Metal Products Ltd. (Respondent)

Unit: "all employees of Nartech Metal Products Ltd. at its Guelph plant, save and except Engineers, Technicians, Machinists, supervisors, those above the rank of supervisor, office and sales staff, quality assurance/control staff and persons regularly employed for not more than 24 hours per week and students employed during school vacation periods" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Subsequent to Vote

3433-94-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Trend Construction and Services Limited (Respondent)

Unit: "all construction labourers in the employ of Trend Construction and Services Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Trend Construction and Services Limited in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non- working foremen and those above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	6
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	5

0122-95-R: United Steelworkers of America (Applicant) v. Pepsi-Cola Canada Ltd. (Respondent)

Unit: "all employees of Pepsi-Cola Canada Ltd. located at 5685 McLaughlin Road in the City of Mississauga, save and except Supervisors and person above the rank of Supervisors, Office Clerical and Sales Staff" (46 employees in unit)

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	52
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	52
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	43

0275-95-R: Christian Labour Association of Canada Construction Workers Local 52 (Applicant) v. Covertite Eastern Limited (Respondent) v. Sheet Metal Workers' International Association, Local 47 (Intervener)

Unit #1: “all employees of Covertite Eastern Ltd. performing roofing, waterproofing and damp proofing work in the industrial, commercial and institutional sector in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell and new high-rise structures in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foreman and persons above the rank of non-working foreman” (18 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	14
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked in favour of intervener	2
Number of ballots segregated and not counted	1

3279-95-R: Local Union 47 Sheet Metal Workers' International Association (Applicant) v. Maverick Mechanical Contractors Limited (Respondent)

Unit: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of Maverick Mechanical Contractors Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of Maverick Mechanical Contractors Limited in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons listed as in dispute	0
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

3403-95-R: Union Des Salaries De Mecanobus (Applicant) v. Mecanobus Ontario Ltd. (Respondent)

Unit: “all employees of Mecanobus Ontario Ltd. save and except managers, stockkeepers and office staff” (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	9
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	7
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0

3768-95-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Gama Interior Contractors Inc. (Respondent)

Unit: “all carpenters and carpenters' apprentices in the employ of Gama Interior Contractors Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of Gama Interior Contractors Inc. in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	3

3830-95-R: International Association of Machinists and Aerospace Workers (Applicant) v. Schlumberger Canada Limited, (Respondent)

Unit: "all employees of Schlumberger Canada Limited, Electricity Division, Utility Services Group in the Greater Toronto Area, save and except supervisors, persons above the rank of supervisor, office and sales staff, and persons working less than 24 hours per week" (29 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	35
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	22

4070-95-R: United Food and Commercial Workers International Union, Local 333 (Canadian Security Union) (Applicant) v. Burns International Security Services Limited (Respondent) v. United Steelworkers of America and International Union United Plant Guard Workers of America Local 1956 (Intervenors)

Unit: "all security guards of the Responding Party in the County of Sussex, County of Kent, County of Middlesex, County of Oxford, County of Perth, County of Essex, County of Huron, County of Lambton, save and except Guard Inspectors or their designates, persons above the rank of Guard Inspector of their designate, office, clerical and sales staff and students employed during the school vacation periods. County of Wellington, County of Brant, Regional Municipality of Waterloo, Regional Municipality of Hamilton Wentworth, Town of Milton, Town of Haldimand, City of Burlington, City of Niagara Falls, City of St. Catharines, Town of West Lincoln, Town of Grimsby, City of Welland, Town of Fort Erie, Town of Dunville, City of Clarkson (Petro Canada), save and except Site Supervisors or their designate, Guard Inspectors or their designates, persons above the rank of Site Supervisor or their designate, Guard Inspector or their designate, office clerical and sales staff and students employed during the school vacation periods" (799 employees in unit)

Number of names of persons on revised voters' list	1299
Number of persons who cast ballots	512
Number of segregated ballots cast by persons whose names appear on voters' list	512
Number of ballots marked in favour of applicant	85
Number of ballots marked in favour of intervenor	329
Number of ballots marked in favour of second intervenor	76
Number of ballots segregated and not counted	22

4244-95-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Town of Port Elgin (Respondent) v. International Union of Operating Engineers, Local 793 (Intervenor)

Unit: "all employees of the Municipal Corporation of the Town of Port Elgin, save and except foreman, persons above the rank foreman and office staff" (18 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervenor	9
Number of ballots segregated and not counted	0

0025-96-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Peel Resource Recovery Operations Inc. (Respondent)

Unit: "all employees of Peel Resource Recovery Inc. employed in the Municipality of Brampton, save and except management supervisors, persons above the rank of supervisor, and office and clerical staff" (52 employees in unit)

Number of names of persons on revised voters' list	48
Number of persons who cast ballots	49
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	39
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	20
Number of ballots segregated and not counted	9

0035-96-R: Teamsters Local Union No. 419 (Applicant) v. Sons Bakery, Division of Bagos Bun Bakery Ltd. (Respondent)

Unit: "all employees of Sons Bakery, Division of Bagos Bun Bakery Ltd. in Brampton, Ontario, save and except supervisors, those persons above the rank of supervisor, office and sales staff" (25 employees in unit)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	1

0076-96-R: Faculty Association of the University of Waterloo (Applicant) v. The University of Waterloo (Respondent)

Unit: "all persons employed as academic staff or professional librarians by the University of Waterloo based in the Regional Municipality of Waterloo, including: (1) persons holding regular appointments (definite term, probationary or tenured), including fractional-load and reduced work load appointments; (2) persons appointed as professional librarians, including librarians whose assigned workload is equivalent to or greater than 50% of a normal workload; (3) persons holding full-time or part-time visiting or research appointments; (4) persons holding full-time or part-time special, adjunct or staff language instructor appointments, whose assigned workload is equal to or greater than 2 term courses per year or the equivalent, save and except for: (1) persons at the level of Dean and above, including the President, Vice-Presidents and the University Librarian; (2) persons appointed as professional librarians whose assigned workload is less than 50% of a normal workload; (3) visiting appointees holding an appointment for one year or less while on leave from another university or comparable institution; (4) persons holding visiting, special, adjunct or staff language instructor appointments whose assigned workload is less than two (2) term courses per year, or the equivalent." (840 employees in unit)

Number of names of persons on revised voters' list	978
Number of persons who cast ballots	706
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	287
Number of ballots marked against applicant	361
Number of ballots segregated and not counted	54

0135-96-R: United Steelworkers of America (Applicant) v. Patton's Place Ltd. (Respondent)

Unit: "all employees of the Respondent in the City of London, save and except managers, persons above the rank of manager, secretary to the Owner, secretary to the Controller, and employees covered by a subsisting collective agreement" (17 employees in unit)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	11
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	11
Number of spoiled ballots	0

0138-96-R: Ontario Nurses' Association (Applicant) v. Toronto Grace Hospital (Respondent)

Unit: "all Registered and Graduate nurses employed at Toronto Grace Hospital, in Metropolitan Toronto, save and except managers and persons above the rank of Manager" (50 employees in unit)

Number of names of persons on revised voters' list	48
Number of persons who cast ballots	41
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	41
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	31

0146-96-R: Bakery, Confectionery and Tobacco Workers' International Union, Local 264 (Applicant) v. Canada Food Equipment Ltd. (Respondent)

Unit: "all employees of Canada Food Equipment Ltd. in the Province of Ontario, save and except supervisors, persons above the rank of supervisors, office, clerical and sales staff" (34 employees in unit)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	30
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	28
Number of segregated ballots cast by persons whose names appear on voters' list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	2

0147-96-R: Association of Allied Health Professionals: Ontario (Applicant) v. Perth and Smiths Falls District Hospital (Respondent) v. Ontario Public Service Employees Union (Intervener)

Unit: "all paramedical employees of the Perth and Smith Falls District Hospital in the town of Perth, save and except supervisors, persons above the rank of supervisor and employees in the bargaining units for whom any trade union held bargaining rights as of April 10, 1996" (17 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	18
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	14
Number of segregated ballots cast by persons whose names appear on voters' list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	15

Number of ballots segregated and not counted 3

0148-96-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Applicant) v. Otema Store Interiors Ltd. (Respondent)

Unit: "all employees of the Responding Party in the Municipality of Markham save and except forepersons, those above the rank of forepersons, office, sales and clerical staff" (76 employees in unit)

Number of names of persons on revised voters' list	93
Number of persons who cast ballots	90
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	90
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	61
Number of ballots segregated and not counted	0

0173-96-R: Teamsters Local Union No. 879 (Applicant) v. CleanSoils Limited (Respondent)

Unit: "all employees of the Responding Party, in the City of Hamilton, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff" (8 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	8
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	7

0186-96-R: Construction Workers Local 53, CLAC (Applicant) v. Pools Homes Limited (Respondent)

Unit: "all employees of Pool Homes Limited engaged in all phases of new and replacement roofing, including the application of asphalt and cedar and other roofing material, shingles, louvers, roof vents, eave protection, step flashing, metal or asphalt valleys, ice and water shield and corner pans, except for flat roofing, in the Counties of Essex and Kent, save and except non-working foremen, persons above the rank of non-working foreman, and office and clerical employees" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	0
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

0196-96-R: Communications, Energy and Paperworkers Union of Canada, Local 87-M Southern Ontario Newspaper Guild (Applicant) v. The Sun Times, Owen Sound a Division of Southam Inc. (Respondent)

Unit: "all employees of the employer in its Advertising Department in the City of Owen Sound save and except the Director of Advertising, Classified Advertising Manager, all persons above those ranks, Administrative Assistant to the Director of Advertising and Classified Advertising Manager" (19 employees in Unit)

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	17
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	11

0206-96-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Steed & Evans Limited Materials Division (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener)

Unit: "all employees of Steed & Evans Limited (Materials Division) working in the Counties of Brant, Bruce, Dufferin, Grey, Norfolk, Perth, Waterloo, Wellington, Oxford and Halton, save and except foremen, persons above the rank of foreman, office staff, dispatch and sales staff" (12 employees in unit)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	5
Number of ballots segregated and not counted	0

0210-96-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. IKEA Canada Limited Partnership (Respondent)

Unit: "all employees of Ikea Canada Limited Partnership at its store in the City of Burlington, save and except managers and persons above the rank of manager, service office and corporate headquarters employees" (120 employees in unit)

Number of names of persons on revised voters' list	119
Number of persons who cast ballots	102
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	102
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	67

0309-96-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Carewell (Westlake Nursing Home) (Respondent)

Unit: "all employees of Carewell (Westlake Nursing Home) at Hallowell Township, Ontario, employed as graduate and undergraduate nurses, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons represented by a trade union as of April 24, 1996" (9 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	7
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	4

0322-96-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ontario Interior Systems (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Ontario Interior Systems in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of Ontario Interior Systems in all other sectors in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	6
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	5

0325-96-R: Canadian Union of Public Employees (Applicant) v. Brockville General Hospital (Respondent)

Unit: "all employees of the Brockville General Hospital regularly employed for not more than 24 hours per week in the City of Brockville, save and except Ward Clerks, Office Staff, Registered Practical Nurses, Professional Medical Staff, Department Heads, Student Dietitians, Graduate Dietitians, Undergraduate Nursing Staff, Graduate Nursing Staff, Undergraduate Pharmacists, Graduate Pharmacists, Supervisors, Technical Personnel, person above the rank of Supervisor and Chief Engineer" (36 employees in unit)

Number of names of persons on revised voters' list	66
Number of persons who cast ballots	31
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	31
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	20
Number of ballots segregated and not counted	0

0390-96-R: United Steelworkers of America (Applicant) v. Ultra Metal Inc. and Enviro-Care Kruncher Corp. (Respondents)

Unit: "all employees of Ultra Metal Inc. and/or Enviro-Care Kruncher Corp. in the City of Waterloo save and except Production Scheduler and persons above the rank of Production Scheduler, office, clerical and sales staff" (35 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	38
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	32
Number of segregated ballots cast by persons whose names appear on voters' list	6
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	6

0409-96-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (Caw-Canada) (Applicant) v. Frictiontech Inc., a Division of Brake Parts Inc. (Respondent)

Unit: "all employees of the respondent in the City of Guelph, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, engineering staff and persons regularly employed for not more than 24 hours per week" (280 employees in unit)

Number of names of persons on revised voters' list	282
Number of persons who cast ballots	277
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	277
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	125
Number of ballots marked against applicant	150

Number of ballots segregated and not counted

0

Applications for Certification Withdrawn

0328-94-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Peter J. Vicano Limited (Respondent)

2707-94-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. J. G. Contracting Ltd. (Respondent)

2682-95-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 2, Toronto and Local 20, Oshawa (Applicant) v. Tony Sica Masonry (Respondent)

0300-96-R: Niagara Health Care & Service Workers Union Local 302 affiliated with the Christian Labour Association of Canada (Applicant) v. Gateway Residence of Niagara Inc. (Respondent)

0582-96-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. North York General Hospital (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

0643-96-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Stackpole Ltd. (Respondent)

FIRST AGREEMENT - DIRECTION

3081-95-FC: United Steelworkers of America (Applicant) v. Metro Taxi Ltd. c.o.b. as Capital Taxi (Respondent) (*Dismissed*)

0263-96-FC: United Steelworkers of America (Applicant) v. 126517 Canada Inc., carrying on business as Carley's Fashions (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1859-93-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. The Hudson's Bay Company, Zellers Inc. (Respondents) (*Dismissed*)

1074-95-R: Quality Control Council of Canada (Applicant) v. BLM Inspection Service Inc. and J. Mulcahy & Associates c.o.b. as J.M.A. or Jay Mulcahy & Associates (Respondents) (*Withdrawn*)

1556-95-R: Sheet Metal Workers' International Association, Local 504 (Applicant) v. The State Group Limited, TCS Total Construction Solutions Inc. (TCS), and RTCS Group (Respondents) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Intervener) (*Withdrawn*)

2366-95-R: Labourers' International Union of North America, Local 506 (Applicant) v. E & M Precast Limited and Fabritex Marble & Granite Ltd. (Respondents) (*Endorsed Settlement*)

2764-95-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. E & E Steeles Electric Ltd., and/or Eli Himelfarb c.o.b. as Steeles Electric, and/or Eli Himelfarb c.o.b. as E & E Steeles Electric and Master Trades Ltd. (Respondents) (*Endorsed Settlement*)

3029-95-R: The International Brotherhood of Electrical Workers, Local 353 (Applicant) v. A & A Electrical Services Ltd. and Rimwood Electrical Services Inc. and Electricomm Cabling Services Inc. (Respondents) (*Endorsed Settlement*)

3762-95-R: Labourers' International Union of North America, Local 506 (Applicant) v. Ultimate Exhibits Inc. and Platinum Show Services Ltd. and Clarke Sales Agency (Respondents) (*Endorsed Settlement*)

3856-95-R: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. Carl Coville o/a Westbrook Walls & Ceilings and Ideal Acoustics and Steel Studs Systems Incorporated o/a Ideal Acoustics and Steel Stud Systems (Respondents) (*Terminated*)

4082-95-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 508 (Applicant) v. Enerdry Constructors Ltd., Valmet Canada Inc., Valmet Paper Machinery (Holdings) Inc., Valmet Automation (Canada) Ltd. (Respondents) (*Withdrawn*)

0049-96-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. TF Enterprises and Bytown Electrical Services Ltd. (Respondents) (*Endorsed Settlement*)

0299-96-R: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Resicon Group Inc. and Tri-Brik Group Ltd. (Respondents) (*Withdrawn*)

0321-96-R: Ontario Pipe Trades Council and The United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local 46 (Applicant) v. Malton Plumbing & Heating Incorporated and Eduard Philipps Limited (Respondents) (*Withdrawn*)

0391-96-R: United Steelworkers of America (Applicant) v. Ultra Metal Inc. and/or Enviro-Care Kruncher Corp. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

1859-93-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. The Hudson's Bay Company, Zellers Inc. (Respondents) (*Dismissed*)

1074-95-R: Quality Control Council of Canada (Applicant) v. BLM Inspection Service Inc. and J. Mulcahy & Associates c.o.b. as J.M.A. or Jay Mulcahy & Associates (Respondents) (*Withdrawn*)

2366-95-R: Labourers' International Union of North America, Local 506 (Applicant) v. E & M Precast Limited and Fabritex Marble & Granite Ltd. (Respondents) (*Endorsed Settlement*)

2764-95-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. E & E Steeles Electric Ltd., and/or Eli Himelfarb c.o.b as Steeles Electric, and/or Eli Himelfarb c.o.b. as E & E Steeles Electric and Master Trades Ltd. (Respondents) (*Endorsed Settlement*)

3029-95-R: The International Brotherhood of Electrical Workers, Local 353 (Applicant) v. A & A Electrical Services Ltd. and Rimwood Electrical Services Inc. and Electricomm Cabling Services Inc. (Respondents) (*Endorsed Settlement*)

3762-95-R: Labourers' International Union of North America, Local 506 (Applicant) v. Ultimate Exhibits Inc. and Platinum Show Services Ltd. and Clarke Sales Agency (Respondents) (*Endorsed Settlement*)

3805-95-R: Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' Int'l Union (Applicant) v. 1153411 Ontario Inc. c.o.b. The Wheat Sheaf (Respondent) (*Withdrawn*)

3856-95-R: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. Carl Coville o/a Westbrook Walls & Ceilings and Ideal Acoustics and Steel Studs Systems Incorporated o/a Ideal Acoustics and Steel Stud Systems (Respondents) (*Terminated*)

4082-95-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 508 (Applicant)

v. Enerdry Constructors Ltd., Valmet Canada Inc., Valmet Paper Machinery (Holdings) Inc., Valmet Automation (Canada) Ltd. (Respondents) (*Withdrawn*)

0049-96-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. TF Enterprises and Bytown Electrical Services Ltd. (Respondents) (*Endorsed Settlement*)

0299-96-R: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Resicon Group Inc. and Tri-Brik Group Ltd. (Respondents) (*Withdrawn*)

0321-96-R: Ontario Pipe Trades Council and The United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local 46 (Applicant) v. Malton Plumbing & Heating Incorporated and Eduard Philipps Limited (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3097-95-R: Joe Henderson (Applicant) v. National Automobile, Aerospace and Agriculture Implement Workers Union of Canada (CAW-Canada) (Respondent) (*Dismissed*)

3303-95-R: Queen's University at Kingston (Applicant) v. Queen's University Faculty Association (Respondent) (*Withdrawn*)

3681-95-R: Kim Hartsell (Applicant) v. United Steelworkers of America (Respondent) v. Seeburn Division, Ventra Group Inc. (Intervener)

Unit: "all employees of Ventra Group Inc. in its Seeburn Division in the Town of New Tecumseth, save and except supervisors, persons above the rank of supervisor, and engineering, office, clerical, sales, security staff and students employed on a co-op work/study program" (175 employees in unit) (*Dismissed*)

3794-95-R; 3795-95-R: Robin's Foods Inc. (Applicant) v. Service Employees Union Local 268 affiliated with the S.E.I.U. A.F. of L., C.I.O., & C.L.C. (Respondent) (*Withdrawn*)

3902-95-R: Windsor Casino Limited (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Respondent) (*Granted*)

3906-95-R: Burns International Security Services Limited (Applicant) v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW Canada), Local 1661 (Respondent) v. International Union, United Plant Guard Workers of America, Local 1962 (Intervener) (*Withdrawn*)

3909-95-R: Burns International Security Services Limited (Applicant) v. The Bakery, Confectionery and Tobacco Workers' International Union, Local 364 (Respondent) v. International Union, United Plant Guard Workers of America, Local 1956 (Intervener) (*Withdrawn*)

3912-95-R: The Toronto-Dominion Centre operating division of Cadillac Fairview Corporation (Applicant) v. Canadian Union of Operating Engineers and General Workers (Respondent) (*Withdrawn*)

4033-95-R: Robert Quesnel (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. Lanthier Bakery Ltd. (Intervener) (*Terminated*)

4155-95-R: 541907 Ontario Limited c.o.b. as Days Inn Toronto Downtown Unionized Employees (Applicant) v. Hotel Employees and Restaurant Employees Union Local 75 of the Hotel Employees Restaurant Employees International Union A.F.L.-C.I.O.-C.L.C. (Respondent) v. 541907 Ontario Limited c.o.b. Days Inn Toronto Downtown (Intervener) (*Withdrawn*)

4236-95-R: Cynthia Chaffey (Applicant) v. Canadian Union of Public Employees, Local 3236 (Respondent) v. Kristus Darzs Latvian Home (Intervener) (*Dismissed*)

0042-96-R: John Ellison (Applicant) v. Retail Wholesale Canada Canadian Service Sector (Division of United Steelworkers of America) Local 414 (Respondent) v. Shelter Canadian Properties Limited (Intervener)

Unit: "all employees of Shelter Canadian Properties Limited in the Municipality of Metropolitan Toronto, save and except Administrative Assistants and persons above the rank of Administrative Assistant, Rental Agents, Recreational Aerobics Instructors and Computer Instructors" (5 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	5
Number of persons listed as in dispute	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3
Number of ballots segregated and not counted	0

0080-96-R: Roy Harkins (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Hearn Excavating (Intervener)

Unit: "all employees of the member employers (members of the Heavy Construction Association of Windsor) in the County of Kent and the County of Essex engaged in operating, maintaining, oiling or greasing on all power driven power generated construction equipment coming within the jurisdiction of the International Union of Operating Engineers as recognized by the Ontario Labour Relations Board (0 employees in unit) (*Granted*)

0136-96-R: Central Lake Ontario Conservation Authority Employees (Applicant) v. Canadian Union of Public Employees (Respondent) v. Central Lake Ontario Conservation Authority (Intervener) (*Granted*)

0165-96-R: Employee's of Pietro Electric Ltd. on Bargaining Committee (8) (Applicant) v. Construction Workers Local 53, CLAC (Respondent) v. Pietro Electric Ltd. (Intervener)

Unit: "all electricians and electricians' apprentices in the employee of Pietro Electric Ltd. in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	8
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	7

0176-96-R: Penny Campbell, Steves Music Store (Applicant) v. Retail, Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Respondent) v. Steve Kirman's Music Ltd. c.o.b. Steve's Music Store (Intervener) (*Withdrawn*)

0266-96-R: Miss Gail Scoins (Applicant) v. Amalgamated Clothing and Textile Workers Union (A.C.T.W.U.) (Respondent) v. Z-Lite-Jenamees (Intervener) (*Granted*)

0312-96-R: Garry E. Thompson (Applicant) v. Construction Workers Local 53, Christian Labour Association of Canada (Respondent) v. G.E. Thompson Plumbing Ltd. (Intervener) (*Granted*)

0432-96-R: Steven Boughey (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 880 (Respondent) v. Maple Roll Leaf, Division of I.T.W. Canada Inc. (Intervener) (*Dismissed*)

0449-96-R: Versa Services Ltd. (Applicant) v. CAW (Respondent) (*Granted*)

0477-96-R: 1025963 Ontario Inc. (c.o.b.) as Union Taxi (Applicant) v. Retail Wholesale Canada Canadian Service Sector Division of the United Steelworkers Local 1688 Ontario Taxi Union (Respondent) v. 1025963 Ontario Inc. (c.o.b.) as Union Taxi (Intervener) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0359-96-U: 970512 Ontario Inc. operating as G & G Masonry (Applicant) v. Bricklayers & Allied Craftsmen Local 2, Toronto, Ontario (Respondent) (*Withdrawn*)

0455-96-U: Iron Workers District Council of Ontario, International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Applicant) v. Jones Power Company Limited, DB Mechanical (Kingston) Limited, Presland Iron & Steel Limited, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 221 (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2719-92-U: Labourers International Union of North America, Local 183, International Union of Operating Engineers, Local 793 (Applicants) v. Associated Paving Company Ltd. and/or Capobianco Management Limited and/or Associated Contracting Inc. and/or Rosalucia Landscaping Inc. and/or The Core Group Inc. and/or Capo Contracting Inc. (Respondents) (*Dismissed*)

2499-93-U; 4353-94-U: IWA Canada (Applicant) v. Goulard Lumber (1971) Limited (Respondent); IWA-Canada, Local 1-2693, (Applicant) v. Goulard Lumber (1971) Limited, Marc Goulard and Romeo Goulard (Respondent) (*Withdrawn*)

0441-95-U: Ramesh Syal (Applicant) v. General Motors of Canada Limited and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 222 (Respondents) (*Withdrawn*)

0528-95-U: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Covertite Eastern Limited, Christian Labour Association of Canada Construction Workers', Local 52 (Respondents) (*Dismissed*)

0932-95-U: Andrea Shettleworth (Applicant) v. The Boy's Home: Maria Bertoni, Evelyn Simpson, Fran Cappe (Respondent) (*Dismissed*)

1362-95-U: United Steelworkers of America (Applicant) v. Sears Canada Inc. (Respondent) (*Withdrawn*)

1519-95-U: Brunhilde Kessler (Applicant) v. Canadian Union of Public Employees, Local 714 (Respondent) v. Corporation of the Town of Fort Erie (Intervener) (*Dismissed*)

1526-95-U: Syndicat canadien de la Fonction publique et sa section locale 2519 (Applicant) v. Corporation Le Lycée Claudel (Respondent) (*Granted*)

2100-95-U; 2101-95-U; 2102-95-U; 3526-95-U; Paul G. Martel (Applicant) v. Labourers' International Union of North America, Local 493 (Respondent) (*Dismissed*)

2559-95-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Trend Construction and Services Limited (Respondent) (*Dismissed*)

2584-95-U: Vincenzo Benincasa et al (Applicant) v. United Food and Commercial Workers International Union, Locals 175 and 633; Michael J. Fraser (Respondent) v. Canada Safeway Limited (Intervener) (*Dismissed*)

2646-95-U: Gus Tabas (Applicant) v. Royal York Hotel, Hotel Employees Restaurant Employees Union, Local 75 (Respondents) (*Dismissed*)

2673-95-U: Terry Ross Mark Weiss (Applicant) v. Lear Seating Canada Ltd., Amalgamated Clothing & Textile Workers Union (ACTWU) Local 1719 and Canadian Lear Workers Union (Respondents) (*Endorsed Settlement*)

2897-95-U: Mark Morell (Applicant) v. United Steelworkers of America (Respondent) v. Group 4 C.P.S. Limited (Intervener) (*Withdrawn*)

3041-95-U: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, Local 1, International Union of Bricklayers and Allied Craftsmen, Local 2, International Union of Bricklayers and Allied Craftsmen, Local 4, International Union of Bricklayers and Allied Craftsmen, Local 5, International Union of Bricklayers and Allied Craftsmen, Local 7, International Union of Bricklayers and Allied Craftsmen, Local 10, International Union of Bricklayers and Allied Craftsmen, Local 12, International Union of Bricklayers and Allied Craftsmen, Local 20, International Union of Bricklayers and Allied Craftsmen, Local 23, International Union of Bricklayers and Allied Craftsmen, Local 28, International Union of Bricklayers and Allied Craftsmen, Local 29, International Union of Bricklayers and Allied Craftsmen, Local 31, International Union of Bricklayers and Allied Craftsmen, Jerry Coelho, Tom Oldham, Ron Anthony and Luigi Scodellaro (Applicant) v. International Union of Bricklayers and Allied Craftsmen (Respondent) (*Terminated*)

3125-95-U: Mike Brown, Ken Rockall, Dean Fester, Wally Belawon, Humber Treatment Plant (Applicant) v. C.U.P.E. Local 43 (H. Smith), Metro Works (Respondents) (*Dismissed*)

3172-95-U: Mrs. E. A. Valeri (Applicant) v. Canadian Union of Public Employees (Respondent) v. Scarborough General Hospital (Intervener) (*Withdrawn*)

3277-95-U: Mary Micallef (Applicant) v. United Steelworkers of America on behalf of its Local 6754 (Respondent) v. Vulcan Packaging Inc. (Intervener) (*Dismissed*)

3327-95-U: Ontario Public Service Employees Union (OPSEU) (Applicant) v. The Crown In Right Of Ontario (as represented by the Ontario Provincial Police) (OPP) (Respondent) (*Withdrawn*)

3398-95-U: Denis Levesque (Applicant) v. International Brotherhood of Electrical Workers Local 1687 (Respondent) (*Withdrawn*)

3615-95-U: Ontario Nurses' Association (Applicant) v. Brant County Board of Health (Respondent) (*Withdrawn*)

3668-95-U: Marie Celine Mundra (Applicant) v. Canadian Union of Public Employees, Local 1325 (Respondent) v. The Board of Education for the City of Toronto (Intervener) (*Terminated*)

3684-95-U: United Food and Commercial Workers International Union (Applicant) v. Tiveron Farms Limited (Respondent) (*Withdrawn*)

3687-95-U: Dan Greenslade & Frank Leal on behalf of all "Cottrell Employees" (Applicant) v. International Brotherhood of Teamsters, Chauffeurs Warehousemen & Helpers of America, Local Teamsters 419 and 938 (Respondents) (*Withdrawn*)

3723-95-U: Ontario Public Service Employees Union (OPSEU) (Applicant) v. The Crown in Right of Ontario as represented by The Ministry of the Solicitor General and Correctional services (Barrie Jail) (Respondent) (*Withdrawn*)

3769-95-U; 3770-95-U: Dean Humphries (Applicant) v. Teamsters Local Union 938 affiliated with the International Brotherhood of Teamsters (Respondent); Dean Humphries, Earl Anderson, Dave Chuudhay, Bob Juneau,

Gregory Sherwood, Dean Bengert, Dan Kozev, James Butler, Steve R. Clark, and Leonard Walsh (Applicant) v. Teamsters Local Union 938 Affiliated with the International Brotherhood of Teamsters (Respondent) (*Withdrawn*)

3783-95-U: Thomas Eastman (Applicant) v. United Steel Workers of America, Local 7685 (Respondent) (*Dismissed*)

3855-95-U: Dave Racine & Others (Applicant) v. Independent Canadian Transit Union, Local 9 (Respondent) (*Withdrawn*)

3913-95-U: Service Employees International Union, Local 204 (Applicant) v. Community Living Niagara Falls (Respondent) (*Withdrawn*)

3978-95-U: The Casual Part Time Workers of Algoma Steel Inc. United Steelworkers of America Local 2251 (Applicant) v. United Steelworkers of America, Local 2251 and Algoma Steel Inc. (Respondents) (*Withdrawn*)

4049-95-U: Wayne G. Siervogel (Applicant) v. Amalgamated Transit Union, Division 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Withdrawn*)

4053-95-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Ingersoll Plastics Inc. (Respondent) (*Withdrawn*)

4074-95-U: Service Employees' International Union Local 204 (Applicant) v. 794641 Ontario Limited (c.o.b. TK's Tap & Grill) (Respondent) (*Withdrawn*)

4108-95-U: Communications, Energy and Paperworkers Union, Local 87-M Southern Ontario Newspaper Guild (Applicant) v. The Spectator, A Division of Southam Inc. (Respondent) (*Endorsed Settlement*)

4123-95-U: Fahmida Nawaz (Applicant) v. Schlegel Company Canada Ltd. (Respondent) (*Withdrawn*)

4140-95-U: Canadian Union of Public Employees, Local 424 (Applicant) v. Stratford General Hospital (Respondent) (*Withdrawn*)

4171-95-U: The Crown In Right Of Ontario, as represented by the Management Board of Cabinet (Applicant) v. The Ontario Public Service Employees Union, and Don Ford and those employees set out in Appendix "A" (Respondent) (*Withdrawn*)

4182-95-U: Cynthia Jackson (Applicant) v. Service Employees' International Union Local 204 (Respondent) v. Visiting Homemakers Association (Intervener) (*Dismissed*)

0004-96-U: I.B.E.W. Construction Council of Ontario (Applicant) v. Mario Electric Limited, Mario Electric Company (Windsor) Limited, Mario Electric Co. (1990) Ltd. (Respondents) (*Granted*)

0009-96-U: Raffick Aliry (Applicant) v. United Steelworkers of America (Local 9236) and Walbar Canada Inc. (Respondents) (*Withdrawn*)

0059-96-U: Ontario Public Service Employees Union (Applicant) v. 696233 Ontario Limited c.o.b. as Gilpin Ambulance Service (Respondent) (*Endorsed Settlement*)

0091-96-U: Louis Martin (Applicant) v. John Haggis Business Manager, I.U.B.A.C. Local 5, (Respondent) (*Endorsed Settlement*)

0093-96-U: London and District Service Workers Union, Local 220 (Applicant) v. Durham Memorial Hospital (Respondent) (*Endorsed Settlement*)

0097-96-U: Tomlin Edwards (Applicant) v. Shopmen's Local Union #834 of International Association of Bridge, Structural and Ornamental Iron Workers (Respondent) (*Withdrawn*)

0100-96-U: Dante Ciccone (Applicant) v. United Food and Commercial Workers International Union (Respondent) (*Withdrawn*)

0114-96-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Sani Mobile S.V.O. Inc. (Respondent) (*Withdrawn*)

0122-96-U: Tina Gibson (Applicant) v. Xerox Canada Ltd., Amalgamated Clothing and Textile Workers Union (Respondents) (*Dismissed*)

0153-96-U: Christian Labour Association of Canada (Applicant) v. Alert Care Corporation (Respondent) (*Withdrawn*)

0154-96-U: Cecil Charles Ferguson Jr. (Applicant) v. Brown Shoe Co. (Respondent) (*Withdrawn*)

0156-96-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Hurley Corporation (Respondent) (*Withdrawn*)

0204-96-U: Garry Steve Schell (Applicant) v. The Hotel Selby (Respondent) (*Withdrawn*)

0219-96-U: Ontario Public Service Employees Union (Roy Lawder) (Applicant) v. Crown in Right of Ontario (Ministry of the Solicitor General & Correctional Services) (Respondent) (*Withdrawn*)

0258-96-U: The International Union United Automobile Aerospace and Agricultural Implement Workers of America Local 251 (Applicant) v. Midwest Waltham Abrasives Company (Respondent) (*Withdrawn*)

0262-96-U: United Steelworkers of America (Applicant) v. 126517 Canada Inc., carrying on business as Carley's Fashions (Respondent) (*Endorsed Settlement*)

0273-96-U: Mrs. Iris McCalla (Applicant) v. Laughlin Centre (Respondent) (*Withdrawn*)

0329-96-U: Retail Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America (Applicant) v. J.M.P. Maintenance Ltd. (Respondent) (*Withdrawn*)

0342-96-U: IWA - Canada (Applicant) v. Hornby Box & Pallet A Division of Pallet Pallet Inc. (Respondent) (*Terminated*)

0362-96-U: Doris Orrico (Applicant) v. The Great Atlantic & Pacific Company of Canada Limited (Respondent) (*Withdrawn*)

0367-96-U: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. Beehler Brothers Electrical Contractors Ltd. (Respondent) (*Endorsed Settlement*)

0424-96-U: Jack Ernest (Applicant) v. Local 550A United Food & Commercial Workers International Union (Respondent) (*Dismissed*)

0426-96-U: Randy Daton Mutton (Applicant) v. Premier Cleaning Contractors of Canada Inc., London and District Service Workers' Union Local 220 (Respondents) (*Dismissed*)

0434-96-U: Service Employees Union, Local 183 (Applicant) v. The Cobourg Retirement Residence operated by Alert Care Corporation (Respondent) (*Withdrawn*)

0435-96-U: Niagara Health Care & Service Workers Union Local 302 affiliated with the Christian Labour Association of Canada (Applicant) v. Gateway Residence of Niagara Inc. (Respondent) (*Terminated*)

0448-96-U: Reginaldo Silva (Applicant) v. United Food and Commercial Workers, Local 1000A (Respondent) (*Dismissed*)

0485-96-U: Janet Watts (Applicant) v. Community Lifecare Inc. (Respondent) (*Dismissed*)

0506-96-U: Bevan Lloyd Mcleod (Applicant) v. Teamsters Union Local 647, Ault Foods (Sealtest) (Respondents) (*Dismissed*)

0541-96-U: Kiwa Kadysiewicz (Applicant) v. Open Window Bakery (Respondent) (*Dismissed*)

0547-96-U: Canadian Union of Public Employees, Local 282 (Applicant) v. Brant County Board of Education (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0046-96-M: The Salvation Army Addictions and Rehabilitation Centre, Industrial Centre c.o.b. as The Salvation Army Metro Toronto Recycling Centre (Applicant) v. Laundry and Linen Drivers and Industrial Workers Local 847 (Respondent) (*Granted*)

0202-96-M: Essex Linen Supply (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 (Respondent) (*Granted*)

0228-96-M: Anchor Textiles (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union Local 351 (Respondent) (*Granted*)

0287-96-M: Ridgewood Industries (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Respondent) (*Granted*)

0406-96-M: Strano Foods, 723779 Ontario Limited (Applicant) v. Christian Labour Association of Canada (Respondent) (*Granted*)

TRUSTEESHIP

4206-95-T: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

1770-87-JD: Boise Cascade Canada Ltd. (Applicant) v. International Association of Machinists and Aerospace Workers, Local 771, and International Brotherhood of Electrical Workers, Local Union 1744 (Respondents) (*Granted*)

0456-96-JD: Iron Workers District Council of Ontario, International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Applicant) v. Jones Power Company Limited, DB Mechanical (Kingston) Limited, Presland Iron & Steel Limited, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 221 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2514-92-M: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, CLC, AFL-CIO (Applicant) v. Metroland Printing, Publishing and Distributing Ltd. (Respondent) (*Granted*)

2091-95-M: Association of Allied Health Professionals: Ontario (Applicant) v. Peel & Halton Community Access Services (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1391-95-OH: Henryk Pasieka (Applicant) v. Industrial Alloys Limited (Respondent) (*Dismissed*)

2157-95-OH: Brenda Trotter (Applicant) v. RT Developments (Respondent) (*Withdrawn*)

3412-95-OH; 3608-95-OH: Nancy M Denbok (Applicant) v. Meaford Beaver Valley Community Support Services (Respondent); Barb Carriere, Lisa Woods, Bob Duder (Applicants) v. Meaford Beaver Valley Community Support Services (Respondent) (*Endorsed Settlement*)

3782-95-OH: Thomas Eastman (Applicant) v. Continuous Colour Coat Limited (Respondent) (*Dismissed*)

4118-95-OH: Shawn Ambrose (Applicant) v. Wilcox Bodies Ltd. (Respondent) (*Withdrawn*)

4119-95-OH: Thomas Schultz (Applicant) v. Swan Dust Control Limited (Respondent) (*Withdrawn*)

4124-95-OH: Marissa Clark (Applicant) v. Transit Shoes - Oshawa Shopping Centre (Respondent) (*Withdrawn*)

4126-95-OH: Wayne Mc Indless and C.A.W. Local 222 (Applicant) v. Harry Wight, John Everson, Ken Shevchuk and General Motors (Respondent) (*Withdrawn*)

4237-95-OH: Sumeeta Pokhan (Applicant) v. Car Park Management Services Limited (Respondent) (*Withdrawn*)

0045-96-OH: Ian Sinclair (Applicant) v. RDS Diagnostics Ltd. (Respondent) (*Withdrawn*)

0127-96-OH: Edward Grentz (Applicant) v. Picture Perfect (Errol Todd) (Respondent) (*Withdrawn*)

0131-96-OH: Ann Hobbs (Applicant) v. Southwestern Medix/EFC Trade Inc. (Respondent) (*Withdrawn*)

0161-96-OH: Peter Maziec (Applicant) v. O-Two Systems International Inc. (Respondent) (*Withdrawn*)

0244-96-OH: Juanita Malone (Applicant) v. Garnet Bowers and Owen Stephanson (Respondent) (*Withdrawn*)

0289-96-OH: Michael Douglas Henderson (Applicant) v. Select Food Processing (Respondent) (*Withdrawn*)

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

4177-95-U: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario (Respondent) (*Withdrawn*)

4183-95-U: Ontario Public Service Employees Union (Applicant) v. Ministry of the Solicitor General and Correctional Services (Respondent) (*Withdrawn*)

4186-95-U: OPSEU (Applicant) v. The Crown and Right of Ontario (Corrections-Vanier Centre for Women) (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

3746-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 666 (Applicant) v. Penn Mechanical Ltd. and Group 92 Mechanical Inc. (Respondents) (*Granted*)

1394-94-G; 0089-96-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Artcon Masonry Inc. (Respondent); Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Markcon Masonry Inc./Mercon Masonry Inc./Artcon Masonry Inc./1013530 Ontario Ltd. (Respondent) (*Endorsed Settlement*)

3982-94-G; 3983-94-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Majestic International Marketing Group Inc. (Respondent); Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Majestic International Marketing Group Inc. (Respondent) (*Granted*)

0117-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. PCL Constructors Eastern Inc. (Respondent) v. Labourers' International Union of North America, Local 527 (Intervener) (*Withdrawn*)

0165-95-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Kennedy Electric Limited (Respondent) v. The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario (the "ETBA") and The Electrical Contractors Association of Toronto (the "ECAT") (Intervener) (*Granted*)

1075-95-G: Quality Control Council of Canada (Applicant) v. BLM Inspection Service Inc. and J. Mulcahy & Associates c.o.b. as J.M.A. or Jay Mulcahy & Associates (Respondents) (*Withdrawn*)

1557-95-G: Sheet Metal Workers' International Association, Local 504 (Applicant) v. The State Group Limited, TCS Total Construction Solutions Inc. (TCS), and RTCS Group (Respondents) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Intervener) (*Withdrawn*)

1921-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. Dufresne Piling Company (1967) Ltd. (Respondent) (*Granted*)

2685-95-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Bytown Electrical Services Ltd. (Respondent) (*Endorsed Settlement*)

2763-95-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. E & E Steeles Electric Ltd., Eli Himelfarb c.o.b. as Steeles Electric, Eli Himelfarb c.o.b. as E & E Steeles Electric, Master Trades Ltd. (Respondents) (*Endorsed Settlement*)

2793-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Two Star Carpentry Contractors Inc. (Respondent) (*Withdrawn*)

2977-95-G: Sheet Metal Workers' International Association, Local 397 (Applicant) v. Ontario Hydro, Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

3030-95-G: The International Brotherhood of Electrical Workers, Local 353 (Applicant) v. A & A Electrical Services Ltd., Rimwood Electrical Services Inc., Electricomm Cabling Services Inc. (Respondents) (*Endorsed Settlement*)

3493-95-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Toronto Masonry (1986) Limited (Respondent) (*Endorsed Settlement*)

3613-95-G: Labourers' International Union of North America, Local 527 (Applicant) v. IPCF Construction, a Division of Properties Inc. (Respondent) (*Withdrawn*)

3632-95-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Dean Chandler Roofing Co. Ltd. (Respondent) (*Withdrawn*)

3765-95-G; 3766-95-G; 3778-95-G; 3810-95-G; 3843-95-G; 3845-95-G: Teamsters Local Union 91 (Applicant) v. Set Construction Ltd. (Respondent) v. The National Capital Road Builders Association (Intervener); Teamsters Local Union 91 (Applicant) v. Dufresne Piling Company (1967) Ltd. (Respondent) v. The National Capital Road Builders Association (Intervener); Teamsters Local Union 91 (Applicant) v. Beaver Road Builders Ltd. (Respondent) v. The National Capital Road Builders Association (Intervener); Teamsters Local Union 91 (Applicant) v. Wimpey Minerals Canada (Respondent) v. The National Capital Road Builders Association (Intervener); Teamsters Local Union 91 (Applicant) v. Deschenes Construction (Ontario) Ltd. (Respondent) v. The National

Capital Road Builders Association (Intervener); Teamsters Local Union 91 (Applicant) v. O'Leary's Limited (Respondent) v. The National Capital Road Builders Association (Intervener) (*Withdrawn*)

3818-95-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. I.P.C.F. Properties Inc., First Professional Developments Limited, and George Weston Limited - George Weston Limitée (Respondents) (*Withdrawn*)

3837-95-G: International Union of Bricklayers and Allied Craftworkers Local 2, Toronto, Barrie, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers (Applicant) v. Albula Construction Inc. (Respondent) (*Granted*)

3857-95-G: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. Carl Coville o/a Westbrook Walls & Ceilings and Ideal Acoustics and Steel Studs Systems Incorporated o/a Ideal Acoustics and Steel Stud Systems (Respondents) (*Terminated*)

4083-95-G: The Ontario Pipe Trades Council and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 508 (Applicant) v. Enerdry Constructors Ltd., Valmet Canada Inc. Valmet Paper Machinery (Holdings) Inc. Valmet Automation (Canada) Ltd. (Respondents) (*Withdrawn*)

4097-95-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. The State Group Limited (Respondent) (*Withdrawn*)

4159-95-G: Labourers' International Union Of North America, Local 527 (Applicant) v. 1041271 Ontario Inc. (Respondent) (*Withdrawn*)

4160-95-G: Labourers' International Union Of North America, Local 527 (Applicant) v. 1055471 Ontario Limited (Respondent) (*Withdrawn*)

0013-96-G; 0200-96-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Camberari Construction Inc. (Respondent) (*Endorsed Settlement*)

0053-96-G: The International Brotherhood of Painters and Allied Trades and The Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Guardian Glass (Respondent) (*Granted*)

0088-96-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Launi Masonry Ltd. (Respondent) (*Granted*)

0099-96-G: Teamsters Local Union No. 230 affiliated with the International Brotherhood of Teamsters (Applicant) v. Marsan Excavating & Grading Ltd. (Respondent) (*Endorsed Settlement*)

0107-96-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. TESC Contracting Company Ltd. (Respondent) (*Granted*)

0132-96-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Q-Tech Limited 663925 Ontario Inc. (Respondent) (*Granted*)

0133-96-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Industrial Commercial Insulation & Contracting (Sault) Ltd. (Respondent) (*Endorsed Settlement*)

0139-96-G: Labourers' International Union of North America, Local 183 (Applicant) v. Williams Carpentry Ltd. (Respondent) (*Granted*)

0142-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Locals 46 and 552 (Applicant) v. Dunwell Mechanical Inc. (Respondent) (*Granted*)

0217-96-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Reaction Drywall (Respondent) (*Granted*)

0243-96-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Central Steel Fabricators Limited (Respondent) (*Withdrawn*)

0247-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Checkmate Plumbing Services Ltd. (Respondent) (*Granted*)

0248-96-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Solar Drywall Inc., Star West Plaster & Cement Finishing Inc., High-View Forming Inc. (Respondents) (*Granted*)

0251-96-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Karlin Investments Ltd. (Respondent) (*Withdrawn*)

0253-96-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Unitech Electrical Inc. (Respondent) (*Withdrawn*)

0255-96-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. TWR Electric Ltd. (Respondent) (*Withdrawn*)

0284-96-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Per-Form Construction Ltd. (Respondent) (*Granted*)

0290-96-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Gasparetto M. Construction (Respondent) (*Endorsed Settlement*)

0310-96-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Pro-Tank Towers, Pro-Tank Erectors Ltd., Enviro Tank Inc. (Respondents) (*Granted*)

0311-96-G: Marble, Tile & Terrazzo Union - Local 31 I.U.B.A.C. (Applicant) v. ET Marble & Tile (Respondent) (*Granted*)

0316-96-G: Labourers' International Union of North America, Local 183 (Applicant) v. Beltem Contracting Inc. (Respondent) (*Granted*)

0320-96-G: Ontario Pipe Trades Council and The United Association of Journeymen and Apprentices of The Plumbing and Pipefitting Industry of The United States and Canada, Local 46 (Applicant) v. Malton Plumbing & Heating Incorporated and Eduard Philipps Limited (Respondents) (*Withdrawn*)

0360-96-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Quantum Forming Limited (Respondent) (*Granted*)

0373-96-G: International Union of Bricklayers and Allied Craftworkers Local 2, Toronto, Barrie, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers (Applicant) v. Blandford Industrial Insulation (Respondent) (*Endorsed Settlement*)

0379-96-G; 0380-96-G; 0381-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 71 (Applicant) v. Llockins Mechanical Ltd. (Respondent) (*Withdrawn*)

0396-96-G: Labourers' International Union of North America, Local 1059 (Applicant) v. The Electrical Power Systems Construction Association, Ontario Hydro, John Bianchi Grading Ltd., Grey-Bruce Tree Surgeons (Respondents) (*Withdrawn*)

0402-96-G: International Union of Operating Engineers, Local 793 (Applicant) v. Mike's Mobile Crane Service (Respondent) (*Withdrawn*)

0414-96-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Black Forming Company Limited, 796249 Ontario Ltd. (Respondent) (*Withdrawn*)

0427-96-G: Labourers' International Union of North America, Local 183 (Applicant) v. Solmar Homes Inc./Tesmar Developments Inc./Benfal Developments Inc. (Respondents) (*Withdrawn*)

0440-96-G: International Union of Operating Engineers, Local 793 (Applicant) v. J. D. R. Tools & Equipment, Division of 819332 Ontario Inc. (Respondent) (*Withdrawn*)

0459-96-G: Construction Workers Local 53, CLAC (Applicant) v. Empire Roofing Corporation (Respondent) (*Endorsed Settlement*)

0461-96-G: International Brotherhood of Painters and Allied Trades, Local 1590 (Applicant) v. B & E Interior Contractors Inc. (Respondent) (*Endorsed Settlement*)

0462-96-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Avecamp Masonry Contractors Limited (Respondent) (*Endorsed Settlement*)

0486-96-G: Labourers' International Union of North America, Local 1059 (Applicant) v. J-AAR Excavating Limited (Respondent) (*Endorsed Settlement*)

0513-96-G: Labourers' International Union of North America, Local 506 (Applicant) v. Santos Developments Corp. (Respondent) (*Granted*)

0514-96-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Quality Masonry (Respondent) (*Granted*)

0515-96-G: International Union of Bricklayers & Allied Craftsmen, Local 5 (Applicant) v. Quality Masonry (Respondent) (*Granted*)

0525-96-G: United Brotherhood of Carpenters & Joiners of America Local 249 (Applicant) v. Westbrook Wall & Ceilings (Respondent) (*Granted*)

0530-96-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Country Masonry Inc. (Respondent) (*Withdrawn*)

0599-96-G: Teamsters Local Union No. 230 Affiliated with the International Brotherhood of Teamsters (Applicant) v. Lazio Excavating Co. Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3216-93-R: Ontario Pipe Trades Council United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 666 (Applicant) v. Penn Mechanical Ltd. and Group 92 Mechanical Inc. (Respondent) (*Denied*)

3805-94-U: Angello Malamas (Applicant) v. Metropolitan Chestnut Park Hotel (Respondent) (*Denied*)

1971-95-R: International Brotherhood of Painters and Allied Trades, Local 1671 (Applicant) v. Ed-Way Contractors Ltd. (Respondent) (*Denied*)

0057-96-U: William J. Viveen (Applicant) v. United Steelworkers of America and Babcock & Wilcox Canada (Respondents) (*Dismissed*)

*Ontario Labour Relations Board,
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July/August 1996



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Bimonthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1996] OLRB REP. JULY/AUGUST

EDITOR: RON LEBI

Selected decisions of particular reference value are
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1784-95-R; 1786-95-U Canadian Union of Operating Engineers and General Workers, Applicant v. Burlington Golf & Country Club Limited, Responding Party

Certification - Certification Where Act Contravened - Discharge - Discharge for Union Activity - Interference in Trade Unions - Unfair Labour Practice - Board finding that employer violated the Act in promoting an employee association in the face of the union organizing campaign and in indefinitely suspending the lead inside union organizer - Board certifying union under section 11(1) of the Act

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *R. M. Sloan* and *P. V. Grasso*.

APPEARANCES: *R. Graeme Aitken*, *Zoran Grgar* and *Elizabeth Ward* for the applicant; *M. D. R. O'Brien*, *Stephanie Vaccari* and *Bernd Klahre* for the responding party.

DECISION OF RUSSELL G. GOODFELLOW, VICE-CHAIR, AND BOARD MEMBER P. V. GRASSO; August 12, 1996

1. These matters arose as an application for certification under section 9.2 of the former *Labour Relations Act*, and an application under section 91 of that Act alleging a breach of sections 65, 67 and 71 [now sections 70, 72 and 76].

2. Although hearings had recently concluded, a final decision had not been released prior to the repeal of the *Labour Relations Act* and the proclamation of the *Labour Relations Act, 1995*. Accordingly, in written correspondence with the Board, the parties were invited to make submissions as to whether the new Act applied and, if so, as to the nature of its effects. In submissions dated January 19 and 24, 1996, the respondent took the position that the applications were subject to the new Act and that the Board was required to apply the new section 11 rather than the old section 9.2. The applicant took the opposite position.

3. Having regard to our findings of fact and our interpretation of the relevant provisions of the new Act, we are prepared to accept, without deciding, that these applications are now subject to the provisions of the *Labour Relations Act, 1995* (the "Act").

4. Section 11 of the Act, states in part:

11. (1) Upon the application of a trade union, the Board may certify the trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:

1. An employer, employers' organization or person acting on behalf of an employer or employers' organization has contravened the Act.
2. the result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.
3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.
4. The trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board to be appropriate for collective bargaining.

• • •

(3) The Board may consider the results of a representation vote when making a decision under this section.

Sections 70, 72 and 76 state:

70. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

72. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

76. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

Facts

5. The applicant commenced an organizing campaign of the respondent's employees on or about May 18, 1995. It appears that a number of employees had become dissatisfied with their working conditions and were looking for a way to improve them. One of the employees obtained the union's name from the telephone book and arranged a meeting with union officials at Chaps Restaurant in Burlington. The meeting was attended by the union's Business Manager, Zoran Grgar, its Business Agent, John Clark, and five employees. At the conclusion of the meeting, four of the employees agreed to become organizers and all five signed cards.

6. After the meeting, the four employee organizers began to solicit other employees for membership. It appears from the dates on the applications for membership filed with the Board that 44 cards were signed in the first 12 days of the campaign, between May 18 and May 30, and three more cards were signed on June 4, 14 and 18, 1995. There then followed a break of approximately two weeks before individual cards were signed on July 3, 6, 9, 17, 20 and 22, 1995.

7. The application for certification was filed on August 8, 1995. It was accompanied by 53 applications for membership. The bargaining unit agreed upon between the parties contained 87 employees on the application date. After discounting the cards that did not correspond to employees in the bargaining unit, the union's level of membership support was 54.5%.

8. The Board heard considerable evidence concerning the operations of the Club from its General Manager, Bernd Klahre. The Club is private. It has between 1250 and 1300 members. A majority of the members are golfers. There are also social and curling members. Mr. Klahre reports to a Board of Directors. The Board of Directors consists of Club members. Reporting to Mr. Klahre are a number of management employees. These employees, together with members of the bargaining unit, generally work in one of three areas: the Clubhouse, the Greens Department, or the Pro Shop. At the time of the application for certification, there were 53 or 54 employees in the agreed upon bargaining unit working in the Clubhouse, 24 or 25 in the Greens Department, and eight or nine in the Pro Shop. The Greens maintenance building and the Pro Shop are separated from the Clubhouse by a public roadway and, in the normal course, employees working in the three areas have little opportunity for interaction.

9. The possibility of a union organizing campaign became known to management sometime in late May. The respondent's Building Supervisor, Greg Krupay, testified that he was advised by his aunt, who is also an employee of the Club, that "a union was" trying to organize the place", that it was "trying to collect signatures", that she "had been approached to sign a card", and that "Liz Ward was behind it". Elizabeth Ward works as a bartender and was characterized by more than one witness as the lead inside organizer. Mr. Krupay immediately relayed this information to Terry Kent, the newly hired Clubhouse Manager. According to Mr. Krupay, Ms. Kent was "surprised", indicated that she could not "believe it", and said that she was "going to have to call Bernie [ie. Mr. Klahre] right away."

10. Ms. Kent testified that she was not surprised to learn of Ms. Ward's involvement in the union because "she's a strong woman and would likely be a leader in that type of thing". She said that she immediately telephoned Mr. Klahre, who, in his evidence, recalled receiving this call over the Victoria Day weekend (ie. May 20-22). Mr. Klahre testified that he advised Ms. Kent "not to worry" and that they would discuss the matter when he got in the next day.

11. Following the subsequent conversation with Ms. Kent, and over the course of the next several days, Mr. Klahre inquired of a number of employees whether they were aware of the union organizing campaign. Mr. Klahre also "phoned around to get some advice" and, "loosely, issued some instructions to people not to do anything to upset the apple-cart". In cross-examination, Mr. Klahre indicated that the employees to whom he spoke had heard rumours about the union, but none had been approached to sign cards. Accordingly, Mr. Klahre testified, he put the matter out of his mind.

12. On June 2, 1995, Ms. Kent held a meeting with Clubhouse employees. The union characterized this meeting in its evidence as an "emergency" meeting. Although the employer disputed this characterization, the meeting appears, at minimum, to have been hastily called. George Abbott is a member of management who gave evidence on behalf of the employer. At the time of the June 2 meeting, Mr. Abbott held the position of Member Services Supervisor. In that capacity, Mr. Abbott had approximately 20 Clubhouse employees reporting to him. Under cross-examination, Mr. Abbott testified that Ms. Kent came to him on June 2, indicated that a meeting was going to be held upstairs in the main dining room and directed him to send as many employees as he could "afford to let go". Mr. Abbott also testified that Ms. Kent told him that the meeting "was to be about an employee association".

13. Ms. Kent later testified that she could not recall having advised Mr. Abbott that the meeting was to be about an employee association and suggested that he may have been "confused". Ms. Kent said that the purpose of the meeting was to address employee dissatisfaction that had been expressed in training sessions held over the preceding few days. The majority prefers the evidence of the apparently more dispassionate and less directly involved Mr. Abbott to that of Ms. Kent. Mr. Abbott also testified in cross-examination that he sent everyone to the meeting who was working at the time and that he could not recall a meeting having been called in this manner in the past. All employees who were at

work in the Clubhouse that day were directed to attend. This included the four trade union organizers and approximately 13 others. The meeting lasted for approximately 45 minutes. All employees were paid for their attendance.

14. Ms. Kent began the meeting by discussing the recent wage increases. She explained that the reasons for any increase, or lack thereof, were individual in nature and could be obtained from the employees' supervisors. She then asked whether any of the employees wished to contribute to the discussion and received only a limited number of responses. Towards the end of the meeting, Ms. Kent indicated that Mr. Klahre had "a good idea that you might wish to consider" - the formation of a "staff association". She said that this might enable employees to bring their concerns directly to management and have those concerns shared with the Board of Directors.

15. The idea of the staff association was not warmly embraced. At least two employees spoke out against it, one of whom indicated that the Board of Directors would be unlikely to take the employees seriously. At the conclusion of the meeting, however, Ms. Ward approached Ms. Kent, thanked her for the suggestion and agreed that the association may be an alternative to the existing situation. According to Ms. Kent, Ms. Ward also suggested that the idea be put in writing. Ms. Ward recalled that this suggestion came from Ms. Kent and that she merely agreed.

16. In any event, on June 8, 1995, the following letter appeared in the employees' pay envelopes:

Dear Staff Member:

June 8, 1995

In our efforts to provide our membership with a first class Golf & Country Club and to establish ourselves as the Club of choice for new members it is essential that all staff are part of our team.

To be successful in our quest for excellence everyone's [sic] ideas and concerns must be heard. We need the means to have effective two-way communications between staff and management and through the General Manager with the Board of Directors.

I therefore would suggest that a Staff Association be established to enable us to dialogue successfully. It will get staff involved in the decision making process to find solutions to such issues as scheduling, compensation/benefits, award programs, seniority/layoffs.

Burlington Golf & Country Club would provide the necessary assistance to establish such an Association.

Please indicate your preference below, detach and leave the questionnaire in confidence with Gail or Carolyn before June 19th 1995.

Please participate in this exciting opportunity.

Thank you

"BERND KLAHRE"

Bernd Klahre,
General Manager

BK/gs

Do you wish to have a Staff Association ?

Yes _____ No _____

17. In cross-examination, Mr. Klahre indicated that the timing of this letter was influenced by Ms. Kent's meeting with her staff and Ms. Ward's encouragement. He denied that it had anything to do with the union organizing campaign. Mr. Klahre testified that the idea of an employee association had originated with the Chairman of the Club's Compensation Committee, Allan Taylor. Mr. Taylor testified that he first raised the subject of a staff association with Mr. Klahre in April and discussed it with him in a number of subsequent meetings. (Mr. Klahre recalled that the first meeting may have occurred as early as February). According to Mr. Taylor, the Compensation Committee had sensed a lack of morale among employees in the Club, which Mr. Taylor attributed to poor communication with management. As a result, sometime in April, Mr. Klahre had been instructed by Mr. Taylor to prepare and circulate among employees a questionnaire that would gauge their interest in the formation of a staff association.

18. Karen Thombs is a waitress and another of the four employee organizers. She testified that, following the meeting of June 2 and the letter of June 8, organizing became more difficult. She said that employees became increasingly unwilling to discuss the union or to sign cards.

19. On the evening of June 8, the organizers met with Mr. Grgar and provided him with a copy of the employer's letter. They also advised him of their belief that employees were becoming reluctant to sign cards because of the employer's initiatives. Accordingly, on June 9, the union put the employer on written notice that an organizing campaign was underway and, in due course, an application for certification would be filed. The union's letter also outlined the unfair practice provisions of the Act and indicated that "charges" would be brought before the Board in the event of any violations.

20. Mr. Klahre testified that, around this time, relations between staff and management deteriorated and complaints from members increased. Mr. Klahre also testified that he received approximately 20 replies in response to his June 8 letter. Of these, all but one or two supported the formation of a staff association. The Greens Department, in particular, took to the idea. Approximately eight Greens employees signified their support for an association.

21. On June 16, 1995, the union sent a letter to employees who had signed membership cards. The letter was signed by Mr. Grgar and included a copy of the Ministry of Labour's "Fact Book for Employees Regarding the Labour Relations Act". The letter advised employees that the campaign was going well and that an application for certification would soon be made. The letter pointed out certain alleged benefits of unionization and advised employees not to be "fooled" by the employer's "cheap ploy" of a staff association.

22. On June 30, 1995, the employer distributed the following letter to employees through their supervisors:

TO OUR EMPLOYEES:

We have been advised by the Canadian Union of Operating Engineers and General Workers that it has begun a drive to unionize the employees of Burlington Golf & Country Club Limited. In view of this development, we would now like to take the opportunity to address you on this subject:

The Labour Relations Act governs the procedures and actions of both management and union in these circumstances and it provides among other things, that:

- (a) where no trade union has been certified as a bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining the union may.....apply at any time to the Ontario Labour Relations Board for certification as a bargaining agent of the employees in the unit.
- (b) if 55% of the employees in a bargaining unit sign membership cards, the union will probably be certified automatically by the Board without a vote of the employees in the

unit. If 40% but less than 55% of the employees sign up then there would be a representation vote to determine if more than 50% of the employees want unionization.

We are attaching to this note a photocopy of certain sections of the Labour Relations Act under the heading "Unfair Practices". This is being attached so that each of you will understand what actions are permitted by management, fellow employees and union representatives in the circumstances. I specifically refer you to Sections 65, 67, 71 and 72. Section 71 is particularly important as you will see that no person, trade union or employer's organization is permitted to intimidate or coerce you to become or refrain from becoming a member of the union.

Burlington Golf & Country Club Limited has a long tradition, having been established in 1922 and as you know, is one of the most prestigious clubs in our area.

The Club, its management and staff, have always functioned at a most professional level. The management has always valued its relationship and goodwill with its employees and expect that this will continue no matter what the outcome is with reference to this effort to unionize.

Just because there is an effort to unionize going on does not mean that you cannot communicate with management. We would be pleased to discuss any issues of concern that you may have and seek alternate solutions if you so wish. Our letter to you of June 8, 1995 is an alternative for your consideration.

As we are all aware, unionization has its pros and cons. Over the years, we have enjoyed a fine relationship with our employees. In the event that you choose to be unionized, then the Labour Relations Act provides that the trade union is recognized as the exclusive bargaining agent of the employees. Traditionally, the Club has always been run with a family-like atmosphere. We have always dealt with you and you with management on an individual basis and it seems that we have been able to deal with our business and problems quite successfully on this more personal basis.

We believe that unionization will certainly depersonalize our working environment and will cause our Club to be run in a different fashion in some respects, which we do not think is necessarily for the better. We, the management, enjoy the working environment that the Club provides, believe it to have been successful in the past and that it will continue to be successful in the future. We would ask that this be taken into consideration when deciding whether or not you wish to be represented by a union.

Yours truly,

"BERND KLAHRE"

Bernd Klahre
General Manager

Mr. Klahre testified that he had been experiencing an increasing sense of frustration over the tensions and uncertainty surrounding the organizing campaign. He said that the June 30 letter was prompted by his desire to "get on with the running of the club".

23. Throughout the organizing campaign, the four employee organizers continued to meet with Mr. Grgar and/or Mr. Clark. Mr. Grgar recalled that there were about eight such meetings, one of which occurred in the last week of June or the first week of July. Prior to this meeting, the union's organizing campaign had focused on the Clubhouse. At that meeting, the employees decided to approach members of the Greens Department and the Pro Shop. Thereafter, and at the request of a Greens Department member, a meeting was arranged for July 13 at Chaps restaurant between members of the Greens crew, the inside organizers, and Mr. Grgar.

24. Two days prior to the meeting, Mr. Klahre approached the members of the Greens Department. According to Mark Gillis, a member of the Greens crew who was called to testify on behalf of the employer, other Greens employees had informed Mr. Klahre of the upcoming meeting with the union and Mr. Klahre had asked one of the two Greens supervisors, Paul Scenna, to tell employees that

he wanted to meet with them. Although lacking a specific recollection, Mr. Klahre testified as to his belief that the meeting arose at Mr. Scenna's request rather than his own. Mr. Scenna was not called to testify by the employer to support Mr. Klahre's belief.

25. The meeting with Mr. Klahre was attended by all Greens employees who were at work on July 11, including the two supervisors. It took place at the 10:00 a.m. "lunch" break. Although Mr. Gillis could not recall the precise duration of the meeting, he thought that it lasted for less than 45 minutes. Mr. Gillis testified that Mr. Klahre informed the employees about "what's been happening with the union and the staff association" and "more or less told us to keep an open mind and not to jump into anything". Mr. Gillis also said that employees "asked questions about wages and things like that". Mr. Klahre testified that he told employees that they had the right to unionize and that he could only ask them to make "an informed decision".

26. The July 13 meeting at Chaps was attended by six members of the Greens crew, including Mr. Gillis. Mr. Grgar testified that Mr. Gillis and at least two others initially expressed some interest in joining the union but indicated that they wished to take time to consider it. Mr. Gillis testified that he said only that he would think about it and would get back to the union if he was interested. No cards were signed at the meeting and none were given out. Afterwards, Mr. Gillis reported on the meeting to the second Greens Department supervisor, Rick Bутtenham.

27. Following the July 13 meeting with the union, all the Greens Department employees presented Mr. Klahre with a letter formally indicating their support for a staff association. In response, Mr. Klahre advised the employees that the creation of an association was not "something for management to do" but was "up to them". He did, however, indicate that the Club would provide the employees with a meeting room. Members of the Greens crew then sought and obtained permission from management for the posting of a notice in the workplace indicating that a meeting would be held in the "Northshore Room" on July 25 to discuss the formation of the association.

28. Prior to the July 25 meeting, on July 20, Mr. Klahre distributed the following additional letter to employees:

TO OUR EMPLOYEES:

Over the last two to three months, efforts have been made to unionize our employees. This has unfortunately caused some strain in our normal amicable relationship with staff and also amongst employees themselves.

We are advised that there is considerable interest in forming an Employee's [sic] Association as opposed to proceeding with formal unionization. If this is so, we would be pleased to meet with your representative(s), and provide a meeting room from time to time should they so require.

For the general welfare of the Club we feel it is important to establish a method of communication and discussion as soon as possible.

Best regards,

"BERND KLAHRE"

Bernd Klahre
General Manager

29. Also prior to the July 25 meeting, on July 21, Ms. Ward was tending bar in the Clubhouse. At about 12:37 she asked one of the wait staff to mind the bar while she went to the washroom. After going to the washroom, Ms. Ward proceeded to her locker where she obtained a union card and a pen. From there, Ms. Ward went to the lunchroom to look for another employee, Heather Harris. When Ms. Harris could not be found at that location, Ms. Ward proceeded outside and found her at the picnic table

eating lunch with another employee. Discussion ensued about the union, ending in Ms. Ward leaving the card and pen with Ms. Harris and returning to the Clubhouse.

30. Upon re-entering the Clubhouse, Ms. Ward was confronted by Ms. Kent and Mr. Krupay. Apparently, Mr. Krupay had observed Ms. Ward at the picnic table and had overheard her discussing the union. Although Mr. Krupay is not Ms. Ward's supervisor, he perceived Ms. Ward's conduct to be sufficiently "unusual" to warrant an immediate report to Ms. Kent. Ms. Kent testified that she was disappointed in Ms. Ward's behaviour because she was "not where she was supposed to be" and, instead, was attempting to persuade a fellow employee to sign a union card. She felt that Ms. Ward's behaviour was having an adverse effect on the delivery of proper service at the Club. Ms. Kent expressed the view that employees, such as Ms. Harris, should be free from "this type of thing" while at work. Although unable to provide any specifics, Ms. Kent also believed that this was not the first time organizing had occurred on company time and company property and, on this occasion, she was going to put a stop to it.

31. The Board heard two versions of what occurred between Ms. Kent and Ms. Ward. Without reviewing this evidence in detail, suffice it to say that Ms. Kent accused Ms. Ward of conducting union business on company time and company property and advised her that such conduct was "against the law". Although Ms. Ward denied in her own evidence that she admitted to Ms. Kent that she was "aware of that" and, in effect, to having engaged in such conduct, we are satisfied that Ms. Ward either knew or ought to have known that she should not have been away from the bar engaging in non-work related activity.

32. After the exchange on the staircase, Ms. Ward returned to her work-station. She testified that the total elapsed time from her departure to her return was approximately 13 minutes. She said that when she left the lounge there had been three tables occupied by a total of 11 members. By the time of her return, one of the tables had been vacated. Throughout the period of her absence two waitresses had been present to serve the members and both knew how to "work the bar". Ms. Ward also testified that it is common practice for waitresses to cover the bar while the bartender takes a break.

33. In cross-examination, Ms. Kent acknowledged that, prior to confronting Ms. Ward, she did not check to see whether Ms. Ward was on a break, whether anyone was covering for her, or whether there had been any adverse effect on service as a result of her departure.

34. Following the exchange with Ms. Ward, Ms. Kent proceeded outside to speak to Ms. Harris and the other employee. She wanted to ensure that they understood that any discussion of union business on company time was prohibited. Ms. Kent then reported the incident to Mr. Klahre, telling him that Mr. Krupay had overheard Ms. Ward soliciting a signature on company time, and that she was not on lunch or an approved break.

35. At about 3:45 p.m., Mr. Klahre summoned Ms. Ward into his office. Ms. Kent was also present. Mr. Klahre handed Ms. Ward a letter and asked her to read it. The letter indicated that, effective immediately, Ms. Ward was being suspended indefinitely. After reading the letter, Ms. Ward said "I guess you would like me to leave now". Mr. Klahre said "yes" and indicated that Ms. Kent and the head waitress would escort her from the premises. The three employees then proceeded to the lounge to pick-up Ms. Ward's glass case and, from there, to the locker room. Only Ms. Ward and Ms. Kent entered the locker room.

36. Ms. Ward testified that, upon entering the locker room, Ms. Kent "started to lecture [her] on unions", indicating that "they used to be useful but aren't anymore". According to Ms. Ward, Ms. Kent said that unions cause problems not only for companies but for employees. Ms. Ward testified that Ms. Kent accused her of having been organizing on company time and company property for some time

and indicated that the Club was not going to tolerate it anymore. Ms. Ward added that Ms. Kent said that the Club no longer wanted people like Ms. Ward around.

37. Ms. Kent denied all of these allegations. She testified that she merely expressed disappointment about the “rifts” that had developed in the Club and regret that “this had to happen”. Ms. Kent also admitted that she advised Ms. Ward that her conduct was “against the labour law”.

38. In our view, the true version of events probably lies somewhere in the middle. However, in light of the conclusions to which we have come on the the other evidence, we find it unnecessary to resolve this conflict.

39. Following the exchange in the locker room and Ms. Ward’s subsequent departure from the premises, Mr. Klahre called two meetings with Clubhouse employees. Each meeting lasted between five to ten minutes and was attended by between six to ten people. The purpose of the meetings was to inform employees that Ms. Ward had been suspended for conducting union business on company time. Mr. Klahre said that he wanted employees to hear it from him first before any rumours started.

40. Mr. Klahre testified that he advised employees that neither management nor the union were entitled to threaten or coerce employees into becoming or refraining from becoming union members, and that if any employee felt threatened or coerced he or she could contact the Labour Board or speak to him or Ms. Kent. Ms. Thombs, who attended the meeting, recalled that Mr. Klahre’s comments regarding intimidation and coercion were directed more towards the union than towards management and were followed by the suggestion that anyone who wished to revoke their signature on a membership card could so inform the Board. Although Mr. Klahre specifically denied having made this latter statement, it was substantially confirmed in the evidence of Mr. Abbott. Mr. Abbott testified that Mr. Klahre advised employees that if they felt pressured or coerced they could get their cards back. According to Mr. Abbott, Mr. Klahre said that he was not yet sure how this could be accomplished but employees could speak to Mr. Klahre or to their supervisors and the information would be obtained for them. A majority of the panel prefers the evidence of Mr. Abbott and Ms. Thombs to that of Mr. Klahre on this issue. Mr. Abbott also testified that he could not recall any other employee having been suspended in his seven years of service at the Club.

41. Mr. Klahre testified that the decision to suspend Ms. Ward was his. The reason for the suspension was that Ms. Ward was not at her work-station, that she was conducting union business on company time, and Mr. Klahre’s “overall frustration” with the situation. In cross-examination, Mr. Klahre admitted to having conducted no independent investigation of the circumstances. He did not inquire as to whether Ms. Ward had found a replacement while she was away from the bar, indicating his belief that she had no right to do so. Mr. Klahre also admitted to having been unaware of the number of members in the lounge and whether there was any adverse effect on service as a result of Ms. Kent’s visit to the picnic table.

42. On July 24, the day prior to the meeting scheduled to discuss the formation of the staff association, Ms. Kent instructed her Assistant Manager to bring in a couple of employees earlier than usual the next day, so as to enable as many employees as possible to attend the meeting. According to Ms. Thombs, Ms. Kent also inquired of a number of wait staff as to whether they were planning to attend, indicating that they would be paid for their attendance if they were already at work or that they could punch-in early and be paid.

43. The meeting was scheduled to commence at 10:00 a.m. It was attended by about 18 people, including Mr. Gillis and Ms. Thombs. Ms. Thombs testified that there was very little said or done for the first part of the meeting, until Mr. Klahre arrived. Mr. Klahre testified that he arrived at work at about 10:20 and was immediately advised by his secretary that the employees would like to see him.

Mr. Klahre was unable to say whether this idea originated with his secretary or whether someone had specifically requested his attendance. In any event, upon entering the meeting, Mr. Klahre advised the employees that it was “their meeting”, that it had been “called by the Greens”, and asked “what they were waiting for”. He then presented the idea of a staff association and compared it to a union. According to both Mr. Gillis and Ms. Thombs, Mr. Klahre also expressed the view that employees had attended the meeting because they were interested in forming an association and that this would be a good opportunity for them to elect representatives. It was Ms. Thombs impression that Mr. Klahre “really, really wanted us to elect representatives that day.” After delivering these representations, Mr. Klahre left the meeting, indicating that he would be in his office if needed.

44. Following Mr. Klahre’s departure, Mr. Gillis asked Clubhouse staff about their problems. After being advised that they were unhappy about such matters as favouritism, wages and workload, Mr. Gillis said that a staff association might be the answer and that management might be willing to compromise. He added that if the staff association did not work out, the employees could still give the union a try.

45. At about 10:55, Mr. Klahre returned. He indicated that the Assistant Clubhouse Manager needed personnel on the floor. He asked whether the employees had resolved anything or elected anyone. Upon being advised in the negative, Mr. Klahre asked whether another meeting would be helpful. If so, he advised the employees that they could be relieved from their regular duties while the Board of Directors served the members. Apparently, the Board of Directors had performed this function on an earlier occasion so as to enable employees to attend a training session. In cross-examination, Mr. Klahre testified that the employees who attended the July 25 meeting were likely paid for their time because “that’s what we usually do if we bring them in”.

Decision

46. On the basis of the evidence, a majority of this panel is of the view that the applicant should be certified without a vote pursuant to section 11(1) of the Act.

47. Section 11 has four requirements. The fourth requirement is that the union has adequate membership support for collective bargaining in a bargaining unit found to be appropriate by the Board. The unit agreed upon between the parties, and which the Board hereby finds to be appropriate, is:

all employees of Burlington Golf & Country Club Limited in the City of Burlington, save and except Assistant Supervisors, persons above the rank of Assistant Supervisor, golf professionals, Head Chef, Second Chef, office and clerical staff.

48. The requirement of adequate membership support was not present in the former section 9.2 and, accordingly, was not the subject of submissions by the parties at the conclusion of the case. The issue was also not addressed by the respondent in its subsequent written submissions. We take this to be in recognition of the obvious: pursuant to the Board’s well-understood case law, 54.5% of the bargaining unit would constitute more than adequate membership support for the purposes of collective bargaining. In our view, the fourth requirement has been met.

49. The first requirement under section 11(1) is that the employer, or a person acting on behalf of the employer, has contravened the Act. The provisions relied on by the applicant are set out above. Broadly speaking they have two aspects. First, the employer, or a person acting on behalf of the employer, must engage in conduct which is variously described as interference, threats, penalties, promises, undue influence, discrimination, intimidation, or coercion with respect to an individual’s employment, the selection of a trade union, the representation of employees by a trade union, or as to an individual becoming or refraining from becoming a union member. Second, once the necessary

conduct has been established, the employer must satisfy the Board that its conduct was not the product, in whole or in part, of anti-union animus.

50. In this case, we are satisfied that the respondent breached the Act both in promoting the employee association in the face of the union organizing campaign, and in indefinitely suspending the lead inside organizer, Elizabeth Ward.

51. The Board's case law on the subject of employer involvement in the promotion of an employee association as a preferred alternative to a trade union is well-established. The essence of that law is captured in the following passages from the Board's decision in *Seven-Up/Pure Spring Ottawa*, [1984] OLRB Rep. Jan. 87, relied on by the respondent:

30. The Board's response to employer expressions of preference for an employee association depends on a number of factors. At one end of the spectrum are the cases which find improper interference when the employer responds to a trade union organizing campaign by suggesting to its employees that they should form an employee association: *Homeware Industries Limited*, *supra*; and, *Zehr's Markets Limited*, [1971] OLRB Rep. Oct. 638 (and see *W. Bolen Enterprises Limited*, [1973] OLRB Rep. Jan. 50 where propaganda leading to a termination representation vote was found improper where the employer suggested that an as yet unformed employee association might be an alternative to continued representation by the incumbent trade union). The employer's demonstrated preparedness to deal with a newly formed employee association may constitute improper interference even if the association was initially formed at the suggestion of the employees rather than the employer: *Upper Canadian Furniture Limited*, *supra*, where the Board said at paragraph 38:

For an employer to attempt to use his right to free speech to initiate an employee association to compete with a union is not protected by section 56 [now 64] [and now section 70]. Even where an employer does not sow the seed of an employee association, its active support for the association may become a potent form of interference in contravention of section 56 [now 64] [and now section 70] of the Act. Given their economic dependence on their employer, employees may be readily swayed by employer conduct, even where subtle, which indicates support for an association over a competing union.

31. At the other end of the spectrum are cases like *Smith Beverages Limited*, [1975] OLRB Rep. Dec. 956 and *Milltronics Limited*, [1981] OLRB Rep. Oct. 1435 wherein an employer's express or implied preference for continued collective bargaining with an incumbent employee association was found not to be improper support or undue influence, when the association had trade union status and a history of collective bargaining with the employer. Closer to the first mentioned extreme are cases like *Seven-Up (Ontario) Limited*, [1970] OLRB Rep. May 198 and *Primo Importing and Distributing Co. Ltd.*, [1982] OLRB Rep. Dec. 1869 and [1983] OLRB Rep. June 959. In *Seven-Up (Ontario) Limited*, *supra*, employees responded to a trade union organizing campaign by suggesting that an inactive employee committee be re-constituted or revived. Management responded by meeting with the revived committee. That action, together with others, was found to constitute undue influence on the part of the employer. In *Primo*, the employer extended recognition to, and entered into a purported collective agreement with, an employee association in the shadow of the organizing campaign of the trade union there applying for certification. The Association had been formed by the members of an employee committee which had come into existence after the applicant trade union lost an earlier representation vote. The Board found (at [1982] OLRB Rep. Dec. 1869) that the Association and its agreement were tainted by the employer support which the employee committee had received. It further found (at [1983] OLRB Rep. June 959) that the employer's dealings with the Association constituted interference contrary to section 64 [now section 70] of the Act.

32. Here the Association was formed long before the applicant commenced its current organizing campaign. The respondent's past dealings with it were part of its approach to employee relations. Provided it is not done in the shadow of a trade union organizing campaign, an employer may

legitimately deal with and, indeed, encourage the formation of an employee committee or association as a vehicle through which it conducts its employee relations, so long as there is no pretense by either the employer or the Association that the latter is a trade union...

52. In the present case, the respondent attempted to characterize its conduct as falling near the end of the spectrum identified in paragraph 31 of the *Seven-Up/Pure Spring Ottawa* decision. We cannot accept this characterization. First, we note that the suggestion of an employee association as an alternative to the pre-existing situation or to the trade union originated with the respondent, not the employees. Second, and while there is no evidence to contradict that of Mr. Klahre or Mr. Taylor that the idea of an employee association was first discussed between them in February or April 1995, nothing was communicated to employees until two weeks into the organizing campaign. Given that this communication occurred after 44 Clubhouse employees had already signed union cards and after Ms. Kent, Mr. Klahre and other employees to whom Mr. Klahre spoke at the end of May acknowledged having been aware of at least the possibility of the organizing campaign, Ms. Thombs' belief that the campaign was, by the time of the June 2 meeting, "common knowledge", the passage of time from when the idea of the association first arose and the somewhat unusual circumstances of the June 2 meeting, we find the suggestion in Mr. Klahre's evidence that the association was not put forward, at least in part, in response to the organizing campaign to be highly improbable.

53. Given these same facts and the relative haste with which Mr. Klahre acted in putting together the letter to employees following the June 2 meeting, we do not believe that Ms. Ward's passing encouragement to Ms. Kent had much to do with either the timing or the substance of the employer's June 8 letter or its subsequent conduct. According to the employer's theory of the case, and despite the information supplied only two weeks previously by Mr. Krupay, at the time of the June 2 meeting Ms. Ward was viewed by management as a bartender, not as a trade union organizer. Accordingly, we simply cannot accept the assertion that management's efforts to promote the association were in any meaningful way aided and abetted by Ms. Ward. In our view, it is abundantly clear from the evidence that the idea of the employee association was the employer's, and the employer's alone, and that it was put forward partially, if not substantially, as a prophylactic against the trade union.

54. In coming to the conclusion that the employer's conduct with respect to the association violated the Act, we note that this behaviour did not end with the June 2 meeting or with the June 8 letter. Rather, it continued for some seven weeks up to and including the meeting of July 25, which began and ended with appearances by Mr. Klahre. Although management was on formal notice throughout this period as to the existence of the organizing campaign, its conduct did not abate. Rather, it delivered two further letters to employees, the first of which refers to the suggestions regarding the association in the June 8 letter as "an alternative" for employees to consider and the second of which identifies "considerable interest in forming an ...association as opposed to proceeding with formal unionization". This third letter also indicates that management "would be pleased to meet with your representative(s) and provide a meeting room from time to time should they so require", before concluding with the suggestion that this be accomplished "as soon as possible".

55. During this period, Mr. Klahre also held a separate meeting with members of the Greens Department. This occurred at a time when, it is reasonable to assume, the support of the "Greens" must have been understood to be of significance to the organizing campaign and prior to their scheduled attendance at a union meeting. Thereafter, Greens Department employees were able to convey their undivided support for the association to Mr. Klahre, but appeared to need some reminding that its creation was "not something for management to do" but was "up to the employees". Management was, however, prepared to cooperate, at least to the extent of granting permission for the posting of a notice in the workplace, providing a room in which to hold the meeting, taking steps to ensure optimal attendance at the meeting, paying employees for their attendance at the meeting, encouraging employees

to elect representatives as soon as possible, and offering a further meeting during which employees could be relieved from their regular duties while the Board of Directors served the members.

56. Even leaving aside for the moment the disparate treatment accorded Ms. Ward's organizing efforts on behalf of the union, a majority of this panel is satisfied that it would have been clear to all employees at the Club that management, including its most prominent owners/customers (ie. the Board of Directors) were not only strongly opposed to the unionization of the Club but were willing to go to considerable lengths to avoid it. Accordingly, we have little difficulty in locating the employer's conduct at the end of the spectrum identified at paragraph 30 of the *Seven-Up/Pure Spring Ottawa* decision, *supra*, and, therefore find that it breached section 70 of the Act.

57. In coming to this conclusion we note, as well, that we reject the employer's written submissions regarding the possible effects of the purpose clause contained in the new Act. In our view, the reference in that clause to the promotion of "employee involvement in the workplace" and the "encourage[ment] of communication between employers and employees" are insufficient to shield the foregoing behaviour from the unfair practice provisions of the Act. Shortly stated, had it been the Legislature's intention to alter the effects of the Board's well-established case law, we have no doubt that it would have expressed that intention in much clearer fashion in the substantive provisions of the Act.

58. This brings us to the treatment accorded Ms. Ward. As previously stated, we are prepared to accept Ms. Kent's evidence that Ms. Ward admitted to having engaged in organizing activity on company time and company property. We have also indicated that we are prepared to accept that Ms. Ward knew or ought to have known that she should not have been away from her work-station engaging in such conduct. What we are not prepared to accept, however, is that the employer's response to Ms. Ward's behaviour was in any sense proportional to the degree of wrongdoing or that it was untainted by anti-union sentiment.

59. Ms. Ward is a long service employee. There is no evidence of any prior discipline on her record. As a bartender, former politician and an individual possessed of a strong personality, she appears to enjoy some prominence in the workplace. At the time of her suspension, and for a period of at least several weeks previously, Ms. Ward also appears to have been known by management to be a key, if not the key, union organizer. All of this, in our view, should have dictated a cautious and measured response to her behaviour. Instead, Ms. Ward became the first employee to have been suspended by the Club in anyone's memory. She was summoned to the general manager's office, handed a letter, escorted from the premises by two management representatives, and given no indication as to when, if ever, she would be permitted to return. Thereafter, and lest there be any doubt about the reasons for her suspension, Mr. Klahre convened two meetings with employees in which he discussed the possibility of harassment and intimidation in the organizing campaign and raised the possibility that employees might wish to revoke their membership evidence.

60. In the absence of any investigation as to what effects, if any, Ms. Ward's conduct may have had on service, the absence of any prior warning that such behaviour would be grounds for substantial discipline, and in light of the other factors identified above, we find the admission by employer counsel in argument that such conduct may have been "an over-reaction" to be a manifest understatement. In our view, management's decision to suspend Ms. Ward and its subsequent conduct can only be understood as the product of a desire to bring home to employees the depth of its opposition to the possible unionization of the Club and the serious risks to employment that employees would run in actively supporting it. Accordingly, and even viewed in isolation from the more beneficent treatment accorded the promotion of the association, we have no doubt that, in suspending Ms. Ward, the respondent violated sections 70, 72 and 76 of the Act.

61. Turning to the second and third factors identified in section 11(1), we note that a certificate cannot issue unless the Board is satisfied that the result of the respondent's contravention is that a representation vote would not likely reflect the true wishes of employees about being represented by the trade union and no other remedy would be sufficient to counter its effects. Although these requirements were not expressly set out in section 9.2 or its predecessors, a similar approach was applied by the Board to the exercise of its discretion under these earlier provisions. Hence, both at the conclusion of the case and in their subsequent written submissions the parties addressed these issues.

62. At the risk of over-simplifying, it was the applicant's submission that the employer's conduct was similar to that which had been found to be sufficient to warrant automatic certification in the past. The applicant relied on such cases as: *PCO Services Inc.*, [1995] OLRB Rep. Apr. 505; *Z-Lite Jenamees*, [1995] OLRB Rep. Feb. 212; *Frade's Fruit Ltd.*, [1995] OLRB Rep. Feb. 122; *Canac Kitchens Limited*, [1994] OLRB Rep. Aug. 972 (where a vote was ordered, together with other remedies); *Repla Limited*, [1990] OLRB Rep. Dec. 1319; and *J. Sousa Contractor Limited*, [1988] OLRB Rep. Oct. 1027. The respondent argued, on the other hand, that there was no evidence of any "chilling effect" on employee behaviour, suggesting that such evidence as there was was to the contrary, and that any misconduct in which it may have engaged was far less than that which had resulted in automatic certification in prior Board decisions. Great reliance was placed by the employer on the following passage from *Primo Importing and Distributing Co. Ltd.*, [1983] OLRB Rep. June 959:

19. This is not the first case in which the Board has been asked to certify a trade union pursuant to section 8 where an employer has contravened section 64 [now section 70] of the Act by supporting an "in-house" employees' organization in order to draw employee support away from that trade union. In *Homeware Industries Limited*, [1981] OLRB Rep. Feb. 164, the employer was found to have interfered with the selection of a trade union by employees contrary to section 64 [then section 56] [now section 70] of the Act, by "proposing the establishing of an employee committee where none had existed before, and then dealing with the committee with respect to working conditions,...so as to draw employee support away from the applicant trade union and towards the committee". In that case as in the present case, the committee was permitted by management to conduct its affairs during working hours and to make use of company bulletin boards. In rejecting the trade union's request for certification without a vote on the basis of the employer's contravention of section 64 [now section 70] of the Act, the Board wrote:

14. For a trade union to be certified under section 71 [now section 8] [now section 11], it is not sufficient that the Board conclude that the employer has contravened the Act. Rather, in a case such as this, the Board must also be satisfied that the true wishes of employees are not likely to be ascertained by way of a representation vote. In the instant case, the statements and actions of [management] would have made it clear to employees that the respondent did not desire to have its employees represented by a trade union and that the respondent would prefer to deal with its employees through an employee committee. However, the respondent's preference in this regard is not likely to have come as a surprise to any reasonable employee. Employees do not expect employers to welcome the unionization of their work forces and a clear indication of this fact by an employer, standing by itself, is not likely to have an unduly coercing influence on employees.

63. In addition, the employer referred to the following excerpt from *Seven-Up/Pure Spring Ottawa, supra*:

40. Not every violation by an employer of the *Labour Relations Act* creates a climate in which employee wishes can in no circumstances be ascertained. The presence of the third of the preconditions to section 8 [now section 11] certification is a question of fact which is determined by the Board on a case by case basis. The factors which have influenced this determination were reviewed by the Board in *The Globe and Mail Division of Canadian Newspapers Company Limited*, [1982] OLRB Rep. Feb. 189:

The Board has found in a number of cases that the employer, in violating the Act, made threats to the continued job security of his employees conditional on whether the union succeeded in its attempt to become certified. In these cases, the Board concluded that the employer violation of the Act was such as to make it unlikely that the true wishes of the employees could be ascertained. An employee is unable to express his true wishes where he has been told by his employer, either expressly or impliedly, and has reason to believe, that the selection of a union may cause the company to reduce the scale of its operation or close down with an attendant reduction in the number of jobs. (See *Dylex Limited*, *supra*, *Lorain Products (Canada) Ltd.* [1977] OLRB Rep. Nov. 734, *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. April 338, *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801, *Sommerville Belkin Industries Limited*, [1980] OLRB Rep. May 79 and *A. Stork and Sons Ltd.*, [1981] OLRB Rep. April 419).

The Board has also applied the section where the cumulative effect of a range of unlawful employer activities, none of which taken separately might call the section into play, has the effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which gives a reasonable employee the confidence to make a free choice. In these circumstances, the Board is forced to the inevitable conclusion that the true wishes of the employees are not likely to be ascertained. (See *Radio Shack*, *supra*, *K-Mart*, *supra*, *Skyline Hotel Limited*, *supra* and *Robin Hood Multi Foods* [1981] OLRB Rep. July 972).

In assessing whether employer breaches of the Act so adversely affect the ability of employees to express their wishes as to justify certification without a vote, the Board considers whether remedies for those breaches can be so crafted as to create a climate in which a representation vote might successfully ascertain the wishes of the employees: *Great Canadian Pizza Co.* [1980] OLRB Rep. Feb. 216; *Simcoe Manor Home for Aged*, [1980] OLRB Rep. Nov. 1696; *Homeware Industries Ltd.*, [1981] OLRB Rep. Feb. 164; *A. Stork & Sons Ltd.*, [1980] OLRB Rep. April 419; *Upper Canadian Furniture Ltd.*, [1981] OLRB Rep. July 1016 and *Primo Importing and Distributing Co. Ltd.*, [1983] OLRB Rep. June 959.

64. In analyzing these passages, we begin by noting that what the Board in *Seven-Up/Pure Spring Ottawa*, *supra*, characterized as a “question of fact” (ie. whether the employer’s conduct has created “a climate in which employee wishes can in no circumstances be ascertained”), we prefer to think of as a matter of labour relations judgement. In essence, and as modified by the language of section 11(1), it requires the Board to apply its accumulated labour relations expertise to determine whether a representation vote would not likely reveal the true wishes of employees, even if it were coupled with such other remedies as a posting and/or an opportunity for the union to address employees at the workplace prior to the holding of the vote. Because of the statutory requirement of confidentiality and inherent problems of reliability, the Board does not require the employer or the union to call a “parade of witnesses” to testify about the possible effects of the employer’s conduct on their wishes concerning trade union representation. Rather, the Board applies an objective test: how would the reasonable employee likely be affected by the employer’s contraventions? Would the employee likely be prevented from expressing his or her true wishes in a representation vote, or could those wishes be safeguarded or restored by the provision of other remedies?

65. Historically, and as alluded to in the *Globe and Mail* decision (cited in *Seven-Up/Pure Spring Ottawa*, *supra*,) the Board has tended to grant unfair labour practice certification in two broad categories of cases: (1) where the employer has made threats to employee job security in the event of unionization; and (2) where the employer has engaged in a range of unlawful activities, short of such threats. We see these as examples of situations in which the Board has determined that employee wishes are unlikely to be ascertained in a representation vote, rather than as closed compartments. Proverbially, each case must turn on its own facts. More recently, for example, the Board has been particularly sensitive to the treatment accorded trade union organizers and known union supporters. Where one or more such employees has been laid off or otherwise removed from the workplace (sometimes coupled with other unlawful employer activity), automatic certification has been granted: see eg. *Repla Limited*,

supra, *Z-Lite Jenamees, supra*, *Frade's Fruit Ltd., supra*, *PCO Services Inc., supra*. Finally, it must also be noted that the Board has been unwilling to grant unfair labour practice certification where the employer's behaviour focused solely on the promotion of an employee association as an alternative to the representation of employees by a trade union: see eg. *Seven-Up/Pure Spring Ottawa, supra*, *Primo Importing and Distributing Co. Ltd., supra*, *Upper Canadian Furniture Limited, supra*.

66. It is this aspect of the case that has caused the panel the greatest difficulty and, as revealed in the accompanying dissent by Mr. Sloan, on which it is most sharply divided. On balance, however, the majority is of the view that the employees' true wishes concerning unionization are unlikely to be expressed in a representation vote, whether or not that vote were to be accompanied by other possible remedies. In our view, this is a case in which the employer has engaged in two very serious and closely related forms of misconduct: the extended promotion and support for an employee association as a preferred alternative to the trade union and the visiting of serious adverse employment consequences upon a key employee organizer for attempting to persuade a fellow employee to sign a union card on company time and company property. Taken together, this conduct, including its implicit threats to employment security, carried out over a period of almost two months, in a workplace of limited size and substantial intimacy, in which employees are required to serve and cater to the owners as customers on a daily basis, and in which at least some of the employees (to borrow Mr. Klahre's phrase not already set out in evidence) view management as "God", will have deprived employees of the ability to express their true wishes about the union in a representation vote. Moreover, we are of the view that this conduct will have left such an indelible imprint on the minds of employees that no remedies the Board could reasonably construct would be likely to alleviate it.

67. In so concluding, we have not forgotten the employer's submissions concerning the absence of any "chill" on employee behaviour. These submissions focused on the assertion that the union's organizing campaign faltered not because of the employer's conduct but because of its organizing strategy. This strategy, according to the employer, paid no attention to the Greens Department and the Pro Shop until some time in July. Further, the employer submitted, there was no evidence of any substantial organizing having been undertaken in the latter part of July other than the attempt to sign Heather Harris; nor was there any evidence that employees were "scared off". In this respect, the employer noted that one card appears to have been signed on the day after Ms. Ward was suspended. Finally, the employer submitted that a substantial number of the employees in the workplace are students, who have only a passing interest in the affairs of the Club and, therefore, are unlikely to be easily intimidated.

68. To the extent that these submissions focus on the likelihood of the union having obtained greater membership support in the bargaining unit even absent the commission of any unfair labour practices, they are somewhat misdirected. As already indicated, the union appears to have obtained substantial, indeed majority, support in the bargaining unit. In these circumstances, the issue is not whether they would have obtained even greater support but whether a representation vote would likely reflect the true wishes of employees. For the reasons already given, we have found that it would not. Further, the fact that the organizers did not seek the support of members of the Greens Department or Pro Shop until some five to six weeks into the campaign or that few cards may have been signed in the month of July are not sufficient to alter this conclusion.

69. As indicated above, the Board applies an objective, not a subjective, test to determine the likely impact of the employer's behaviour on employee wishes. Thus, the fact that one card may have been signed on the day after Ms. Ward was suspended or, for that matter, that Ms. Ward may have been seen approaching the Greens maintenance building "in broad daylight" at the end of June, are not sufficient to alter our conclusion that employees have likely been irremediably affected by the cumulative impact of the employer's unlawful activity. Finally, we see no reason to distinguish between

students and others for the purposes of this analysis. In this respect, we note that both of the students who testified at the hearing expressed a desire to be “hired-back” next summer and, to that extent, may be seen as being more, rather than less, susceptible to the employer’s unlawful behaviour.

70. In the result, a certificate will issue to the applicant for the bargaining unit set out in paragraph 47 of this decision.

DECISION OF BOARD MEMBER R. M. SLOAN; August 12, 1996

1. I most strenuously dissent from the majority decision.
2. My concerns with the majority decision are legion and include among others, the exclusion of references to much pertinent and relevant material; the uneven treatment accorded the respondent’s principal witnesses; and the disposition to ignore, in the main, serious credibility problems associated with the applicant’s main witness.
3. If we accept for the sake of argument that all of the facts recorded by the majority decision are complete and correct, and are given a full and accurate interpretation, there can be no justification for the decision arrived at by the majority.
4. Of additional concern to me is the almost total absence of the application of the provisions of the current *Labour Relations Act* and an erroneous application of case law which was based on previous - substantially different - legislation, particularly in respect to the areas pertinent to this instant application.
5. The question that the Board is called upon to answer is not did the employer contravene the Act, but was that contravention so significant that a representation vote would not likely reflect the true wishes of the employees in the bargaining unit.
6. The majority decision fails utterly to show that the true wishes of the employees in the bargaining unit cannot be ascertained through the holding of a secret ballot representation vote.

Legislation

7. It is well recognized in the Ontario labour management community that the current *Labour Relations Act* embodies many very significant changes from the previous legislation and in particular, for the immediate application to the facts of our case, section 2 - “Purposes and Application of Act”; sections 7 through 15, “Establishment of Bargaining Rights by Certification”; and section 70 - that portion dealing with what are generally referred to as the “free speech provisions” of the Act.

8. Section 2 - “Purposes and Application of Act” reads:

2. The following are the purposes of the Act:

1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.
2. To recognize the importance of workplace parties adapting to change.
3. To promote flexibility, productivity and employee involvement in the workplace.
4. To encourage communication between employers and employees in the workplace.

5. To recognize the importance of economic growth as the foundation for mutually beneficial relations amongst employers, employees and trade unions.

6. To encourage co-operative participation of employers and trade unions in resolving workplace issues.

7. *To promote the expeditious resolution of workplace disputes. New.*

(emphasis added)

9. It is abundantly clear from the foregoing paragraph that employers have the right, indeed are encouraged to communicate with employees on a variety of matters that effect the workplace relationships between employers and *employees*, subject to the prescribed limitations contained in section 70 of the Act.

10. Section 70 reads as follows:

70. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, *but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.*

(emphasis added)

11. Section 70, as we see from the foregoing, lists five (5) specific areas in which employers are prohibited from communicating to employees - through whatever means - verbal or written - material that could be construed to be: *coercion, intimidation, threats, promises or undue influence*. I shall refer to this list on a number of occasions throughout this dissent.

12. With respect to the applicant's claim of a breach of sections 72 and 76, I would point out that those sections do not confer any *rights* upon individual employees to engage in union activity on company premises, nor during that individual's working hours. Indeed prior to the filing of an application for certification a union has no statutory right of access to an employee group at the workplace or on worktime.

13. Clearly sections 72 and 76 have not been violated by the respondent and have no application to the facts of this case. There has been no evidence adduced to support any claim of any violation of these two sections of the Act.

14. A careful reading of the relevant provisions of the Act clearly establish the employer's right to communicate freely with its employees, and a careful consideration of all of the circumstances of this case can lead to no other conclusion than that the communication with respect to the staff association and other matters was made free of any taint with respect to the section 70 prohibitions.

15. Section 11(1) of the Act reads as follows:

11. (1) Upon the application of a trade union, the Board may certify the trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:

1. An employer, employers' organization or person acting on behalf of an employer or employers' organization has contravened the Act.
2. The result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.

3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.
4. The trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board to be appropriate for collective bargaining.

I shall refer to this section in some detail later in this dissent.

Background

16. We heard evidence from Mr. Klahre that the management of the Burlington Golf and Country Club, concerned about organization and operational problems, decided as far back as the autumn of 1994 to concentrate on improving the service offered to its members by promoting increased competency and efficiency among its staff members, and to facilitate communication among the staff members within the total facility, and between the staff and management.

17. There were serious deficiencies in the service to members and in the effectiveness and morale of the staff, as well as poor communications among all levels of employees. This setting must be taken into account when assessing the facts of this case.

18. The work which commenced in the fall of 1994 was the first step in establishing the clubs' determination to improve organizational efficiency and its service to its members. The evidence further established that in pursuit of these operating goals discussions were held early in 1995 (while the exact date(s) may not be available they commenced not later than some time in the month of April, 1995) - between Mr. Bernd Klahre and Mr. Allen Taylor, a member of the Board of Directors of the Burlington Golf and Country Club and a full member of the club for some sixteen (16) years.

19. Mr. Taylor further testified that he was familiar with the operation and benefits of staff associations having worked with a staff association in his company for close to thirty-five (35) years. We further learned from Mr. Taylor that he had been authorized by the Board of Directors to enter into discussions with Mr. Bernd Klahre with the goal of having the latter broach the possibility of a staff association with employees-at-large.

20. Part of the staff association discussions included the use of the material/forms associated with employee evaluation and a related questionnaire which I will refer to again later on.

21. We further heard from Mr. Taylor - and this reinforces the seriousness with which the club approached the staff association issue - that six (6) or seven (7) meetings were held with Mr. Klahre on this topic all before the 8th of June, 1995, that is, before the employer had any formal knowledge of the union's organizing drive.

22. We know that staff associations are a legitimate and legal form of promoting communication; problem solving; and morale building in business enterprises, so the employer is to be complimented rather than criticized for efforts made in this direction.

23. From all of the above it is abundantly clear that management's consideration of a staff association as a potential means of realizing their operating needs preceded, and its conception was not in the least influenced by, any interest employees might have had in being represented by a trade union.

Credibility

24. The credibility of the witnesses has been assessed based on factors such as the demeanor of the witnesses when they were giving their evidence, the clarity, consistency and firmness of their

recollections, the ability of the witnesses to resist the influence of self-interest in shaping their testimony, and the plausibility of their version of events in light of contradictory evidence.

25. I found the Club's two main witnesses Mr. Bernd Klahre and Ms. Terry Kent to be highly credible detailing pertinent facts in a most forthright, convincing and helpful manner. Regrettably, I can not say the same for the union's principal witness Ms. Elizabeth Ward. I found that she exhibited a sometimes less than scrupulous attitude towards the truth.

26. A number of the issues which cause me concern relate firstly to Ms. Ward's testimony with respect to her three years at a university in Nova Scotia. Ms. Ward testified under oath that she could not recall neither the name of the university nor where it was located, and secondly - and more importantly - her testimony regarding the incident which led to her suspension.

27. Even the majority decision confirms the fact of Ms. Ward being less than truthful where in paragraph 58 it acknowledges that Ms. Kent's version of their encounter was to be accepted. Incidentally it was not only the version of the incident given by Ms. Kent that was completely at odds with Ms. Ward's account, but also the first-hand testimony of Mr. Gregory Krupay which supported Ms. Kent's testimony to the letter. Mention of Mr. Krupay's important corroborating testimony is omitted from the majority decision.

28. I question why the majority decision places an adverse slant on Ms. Kent's evidence - two examples are the omission of any reference to Mr. Krupay's testimony on the crucial issue of the incidents relating to the suspension, and in paragraph 13, by discarding Ms. Kent's evidence with respect to the purpose of the June 2, 1995 meeting in favour of that given by Mr. George Abbott even in the face of the uncertainty expressed by Mr. Abbott. There is no definite evidence, nor for that matter any reason, to attempt to negate the truthfulness of Ms. Kent's testimony with respect to the purpose of the June 2, 1995 meeting.

29. On balance then, and supported by the evidence, I would accept the testimony of Mr. Klahre and Ms. Kent where any of that testimony is in conflict with that given by Ms. Ward.

Staff Association

30. We have seen from the background material commencing on page 5 that the respondent was well into exploring the concept of a staff association before the union organizing drive commenced.

31. We have also learned that without formal knowledge that a union organizing drive was underway - management had heard prior rumours to this effect - that Mr. Klahre wrote to all staff members, under date of June 8, 1995, suggesting that they establish a staff association and soliciting their *voluntary* and significantly their *anonymous* views in a "yes" or "no" format as to whether or not they wished to have a "staff association".

32. The full text of Mr. Klahre's June 8, 1995 letter is produced in paragraph 14 of the majority decision. There is no basis in this letter for finding any reference whatsoever that could be construed as coercion, intimidation, threats, promises or undue influence. The letter was a straight-forward request for a voluntary expression of employees' wishes.

33. On June 2, 1995 Ms. Kent called a meeting with employees to discuss - as she testified - matters of concern expressed by a number of employees during previously held training sessions. At that meeting Ms. Kent also raised the matter of a staff association and from the direct testimony of union witnesses the reception given to the matter was less than favourable, with a number of employees voicing strong reservations about the potential value of a staff association. The fact that employees felt

comfortable in raising such objections in the presence of management suggests that they cannot be characterized as a group of intimidated employees, who would be unable to express their true wishes with respect to union representation in a *secret ballot* vote.

34. Here is Ms. Ward's account of part of that meeting given in examination-in-chief:

"The general tenor of the meeting at least by the evidence as to who spoke up - was that it (the staff association) was not a good idea based on one persons' experience with an employee association at a previous work location".

The above is a further example of employees freely offering their views opposed to the staff association. When asked by her counsel whether Ms. Kent responded to these negative comments, Ms. Ward testified that:

"No, I think she was surprised by the comments, she did say she wished everybody to consider the association".

"Then Ms. Kent asked if there were any questions - no one seemed to have any."

35. In response to the questionnaire attached to the June 8, 1995 letter, Mr. Klahre testified that he had received twenty (20) replies and all but two (2) supported the formation of a staff association.

36. Prior to the June 2, 1995 meeting we heard testimony from Ms. Kent that she had heard rumours that Ms. Ward was involved with the union so it was not surprising that she was especially interested in what Ms. Ward had to say. At the conclusion of the June 2, 1995 meeting Ms. Kent was approached by Ms. Ward and here is Ms. Ward's account, given under examination-in-chief, of at least part of that conversation:

"On my way out I thanked her (referring to Ms. Kent) she said that Mr. Klahre was considering sending out a letter to all employees regarding the association. I just said that it may be a good alternative and that it was a good idea to send out the letter".

When asked by her counsel why she had made the above comments, Ms. Ward replied:

"For one thing I didn't think employees should be subject to just one alternative like a union - there are bound to be employees who don't want to join a union and I was covering all the bases. I had already talked to some employees who were adamant about not joining the union - Zoran Grgar not impressed upon us we were not to coerce - I felt that they (the employees) should be subject to two choices. At that point I was very much aware that I had a large number of employees who signed union cards that I didn't have much concern about employees accepting an association".

37. During the course of his final argument, counsel for the applicant responded to a question by the writer with respect to the remarks made by Ms. Ward (and quoted in the foregoing paragraph) following the June 2, 1995, meeting and counsel declared that her (Ms. Ward's) "response was genuine, that she meant what she said". So what we have here is not merely passive agreement as noted in paragraph 15 of the majority decision, but open acceptance and approval by Ms. Ward of the concept of the staff association and direct encouragement to the employer to send out a letter to all employees advising them of the staff association as an "alternative". (Ms. Ward's word).

38. Further, in a letter dated 9 June, 1995 Mr. Sean Clancy, Business Agent wrote to Mr. Klahre and Mr. Dave McPhee, Chairman of the Board (I believe that it can be safely assumed that Ms. Ward had reported back to the union about the respondents intentions with respect to communicating with the employees on the staff association matter). Nowhere in his June 9, 1995 letter did Mr. Clancy make any mention, even obliquely, of the staff association. Had he in fact had some concerns about the staff association this would certainly have been the opportunity to record them. Mr. Clancy certainly had

every opportunity to address the staff association matter but it appears from the generalities in the letter, and the absence of any specifics, that the employer's interest in the staff association was not considered to be a breach of the *Labour Relations Act*. Mr. Clancy had every opportunity to make such an allegation since the sole purpose of his letter was to deal with potential violations of the Act.

39. Again, in a letter/memorandum dated June 16, 1995 addressed to all employees of the Burlington Golf and Country Club, Mr. Grgar as Business Manager, Local 101, criticized the staff association as a concept but did not take issue with or challenge the employer's right to discuss the matter with employees.

40. Mr. Grgar writes in part, in the third paragraph of his June 16, 1995 letter, words that are, in the main, inaccurate, misleading, and derogatory. It reads as follows:

Everyone knows that jobs are not easy to find - that is why the favourite response of the *Boss* is "If you don't like it, there's the door." (Just wait until he gets his first grievance.) This favourite saying will soon disappear. Already the Boss is sending you "Love Letters" (see memo enclosed). (Remember..."If it smells like it, and it looks like it - it sure is.") They want you to establish a "Staff Association." This is a method of distracting you from your real objective, because a "Staff Association" is *not* a union and will never have the same power to put the *Boss* in his or her place. *Don't be fooled by this cheap ploy. This Staff Association will not be recognized as a union by the Ontario Labour Relations Board because it is not legitimate - it is only a charade.* It is interesting that the *Boss* is already concerned about the union - the *Boss* realizes that he/she will not be a dictator much longer.

41. Contrast, if you will, the wording contained in Mr. Grgar's written communication quoted in the preceding paragraph, with the reasoned, matter-of-fact approach taken by the respondent in its written communications dealing with the staff association and the union organizing drive.

42. It would seem that the majority - in not reporting in any detail on Mr. Grgar's comments - see nothing wrong with the union attempting to demean the employer with scurrilous comments and in misleading the employees with respect to the status of a staff association in the eyes of the Ontario Labour Relations Board.

43. Mr. Grgar knows I am sure that staff associations are wholly acceptable and effective means of promoting good working relationships between employers and employees and that when the occasion arises staff associations can, and have, been granted status before the Board as trade unions, and have entered into valid collective agreements recognized as such under the Act.

Disciplinary Action

44. In paragraph 49 the majority decision finds that the Act was breached by the respondent in two respects:

- "...promoting the employee association in the face of the union organizing campaign...", and
- "...in indefinitely suspending the lead inside organizer, Elizabeth Ward."

45. In the previous paragraphs of this dissent I have dealt with the matter of the staff association. In this portion of my dissent, I will deal with the indefinite suspension.

46. Firstly, I think that it is important to define the role played by Ms. Ward with respect to the circumstances of her position and behaviour prior to, during, and following her suspension.

47. In paragraph 53 of the majority decision we see Ms. Ward referred to by the majority "...as a bartender, not as a trade union organizer", suggesting that because of her position as "only" a bartender she could not have possibly played any role in influencing management with respect to promoting the association.

48. However, in paragraph 59 the majority recognizes Ms. Ward's true impact at the Burlington Golf and Country Club when they write:

"As a bartender, former politician, and an individual possessed of a strong personality she appears to enjoy some prominence in the workplace".

(emphasis added)

I agree with this later assessment of Ms. Ward and will refer to it again when dealing with her comments to Ms. Kent following the 2 June, 1995 meeting during which the staff association was discussed.

49. While no evidence was adduced to substantiate her assertion, we did hear from Ms. Kent that it was her belief that Ms. Ward had, before the 21 July incident, engaged in union activity during her working hours and that this knowledge contributed to her response to the events on that day.

50. There can be absolutely no question whatsoever that Ms. Ward absented herself from her work station without authorization, and engaged in union activity during her working hours on 21 July, 1995 - an activity rendering her subject to disciplinary action.

51. The majority decision dilutes this fact, inexplicably, by writing that Ms. Ward, "...either knew or ought to have known...". Ms. Ward clearly, by her own testimony knew what her responsibilities were and that she was wrong to engage in union activity during her working hours.

52. Further, Mr. Grgar in his June 16, 1996 letter/memorandum to "All Employees of Burlington Golf and Country Club" included a photocopy of the Ontario Ministry of Labour's - "A fact Book for Employees" on the *Ontario Labour Relations Act*. A pertinent paragraph, included on page 9 of that document, is worth recording here:

Even though employers are not allowed to interfere with a union organizing drive, they still have the right to conduct business in the normal way. For this reason, your employer has the right to forbid any organizing activity on his or her property and may still penalize you during an organizing drive for causes unrelated to your right to support a union.

(emphasis added)

53. It is unequivocally clear from the above quoted Ministry of Labour document that the respondent - and any other employer for that matter - can correctly believe that it has the right to take disciplinary action against employees conducting union activities on company time - particularly "organizing activity" under the particular circumstances of this case. We know from Ms. Kent's testimony that the employer was aware of this limitation on organizing activity when it took the disciplinary action that it did. Surely, if any conduct fits into the category of "organizing activity" it is the attempt to have an employee sign a union membership card.

54. We know from Ms. Ward's uncontradicted testimony that that is exactly what she did in her contact with Ms. Heather Harris, although Ms. Ward in my view disingenuously attempted at one point in her testimony to convince the Board that she was not "soliciting" but merely delivering a membership card to Ms. Harris.

55. Ms. Ward would have the Board believe in other parts of her testimony that she merely dropped off a membership card to Ms. Harris on her way back to her work area from the washroom. Note how this contrasts markedly with the testimony of Ms. Kent and Mr. Krupay which testimony was preferred by the majority.

56. The majority decision makes much of the fact that neither Ms. Kent nor Mr. Klahre followed up on Ms. Ward's claim that she had asked someone in the food and beverage area to fill in for her during her absence from her work station while communicating with Ms. Heather Harris on union organizing business.

57. With respect, Ms. Ward did not testify that she had asked a specific, named employee, to fill in for her during her absence, but in another example of misleading testimony which the majority believed she advised that "...it is common practice for waitresses to cover the bar while the bartender takes a break". This is not the same as Ms. Ward having actually asked a fellow employee to cover for her during her absence. She did not identify the waitress nor did she claim that she was on a break (presumably she was referring here to an authorized break). It is interesting that the pleadings which were filed with the instant application, despite being very detailed, make no mention whatsoever of Ms. Ward obtaining a replacement to cover her absence from her work station. If such a person does exist, why wasn't she (a waitress) called as a witness?

58. It is an incontrovertible fact that the employer was within its rights under the *Labour Relations Act* to consider and take disciplinary action under the circumstances of Ms. Ward's 21 July, 1995 union organizing activity.

59. If Ms. Ward now expects the Board to believe that she was not engaged in union activity at the time of the incident which led to the employer legitimately taking disciplinary action, why did she not deny this assertion by the employer in her conversations with Ms. Kent, Mr. Krupay and Mr. Klahre?

60. Ms. Ward was not "exercising her right to support a union" but was clearly engaged in union organizing activity during her working hours contrary to her own certain knowledge; the instructions received from Mr. Zoran Grgar; and material contained in the pamphlet published by the Ontario Ministry of Labour which she had in her possession well before July 21, 1995, the day of her suspension.

61. Having established that the employer was not in breach of the Act for imposing discipline, we can now consider the majority decision's concern with the form of that discipline.

62. It is a very common and indeed under many circumstances the most appropriate response to apply an indefinite suspension under circumstances where a review or investigation of the facts is warranted to ensure that reasoned, supportable, fair action is taken.

63. Under the particular structure at the Burlington Golf Club where the General Manager reports to a Board of Directors, who in turn represent the membership, we could expect that on an issue as potentially significant as the one faced by Mr. Klahre (subsequent events support the wisdom of his action) it would be prudent to impose an indefinite suspension pending consideration of the facts.

64. Had Mr. Klahre imposed a definite penalty such as a fixed suspension he could have been criticized by the majority for acting out of haste without giving the matter due consideration.

65. Before a definite form of discipline could be decided on, the union filed an unfair labour practice under section 91 of the Act and on August 11, 1995 the parties arrived at a voluntary settlement reinstating Ms. Ward to her position as bartender with full compensation for any wages lost.

66. This settlement, it is worth noting was a voluntary one and resulted in the union withdrawing its application for an interim order under Board file No. 1785-95-M. A Board order did not result from this voluntary settlement.

67. While the majority may not approve of the handling of the disciplinary matter - their comments suggest they might like it to have been handled differently - they acknowledge that some form of disciplinary action was warranted - but do not, significantly, tell us what form of disciplinary action they would find to be appropriate - and I contend therefore *there can be no breach of the Act*.

68. In respect of the majority's findings in paragraph 50, I believe that the majority exceeded the Board's jurisdiction in concluding that the respondent breached the Act when it exercised its acknowledged legitimate right to take disciplinary action.

Chilling Effect

69. Paragraphs 67 and 68 of the majority decision deal with the subject of the "chilling effect" upon the union organizing drive.

70. To set the record straight, the submissions of counsel for the respondent are correct - the organizing drive ended when it did because of union strategy - and this submission is fully supported by the testimony of Ms. Karen Thombs and Ms. Ward.

71. Ms. Thombs testified that the subject of union representation had been discussed for some months prior to May 18, 1995 so *she had a pretty good idea of who was in favour of the union and she approached only those people with whom she felt comfortable* (emphasis added).

72. The decision made by the organizers to approach only those employees with whom they "felt comfortable" resulted in the following pattern of having membership cards signed:

May 18, 1995 - Five(5) membership cards signed in the presence of Mr. Grgar - including both Ms. Thombs and Ms. Ward.

By May 30, 1995 - A further analysis of the signing dates on the cards shows that by May 28, 1995 approximately 80% of the total number of valid membership cards were signed - this is all within two(2) weeks of the commencement of the organizing drive.

Between June 4, and July 22, 1995 - A further nine(9) cards were signed - no two cards being signed on any one day.

- It is significant that during the whole month of June, well before Ms. Ward's suspension and during a period when there was no suggestion of undue employer influence, the organizers signed only three(3) membership cards.

73. The fact that the union organizers effectively terminated their organizing efforts voluntarily eliminates any possibility that the majority in their decision can assert, even by inference, that any behaviour on the part of the employer influenced employees to refrain from becoming members of the union and this being the case, there can be no suggestion whatsoever that this aspect of the case will effect the employees ability to express their true wishes in a representation vote.

74. The evidence clearly supports the proposition that the organizers consciously and effectively completed the bulk of their campaign in its early stages eliminating any possible allegation of a chilling effect.

Communications

75. The Board was not provided with any evidence to show that either through verbal or written communications to employees that the Employees would be in any way adversely influenced so that their true wishes could not be made known through the holding of a secret ballot representation vote.

76. The employer's written communications to employees were models of propriety and each one imparted factual information about the Act, or provided information and/or positive options for the employees voluntary consideration with respect to the staff association. (It is worth repeating here again that Ms. Ward shared the employer's view with respect to the value of having employees consider a staff association).

77. Again, I am unable to find any reference whatsoever in any of the employer's communications that would constitute coercion, intimidation, threats, promises or undue influence.

Automatic Certification

78. It is long established Board practice to grant automatic certification only when the conduct of the employer is found by the Board, on the basis of the evidence, to be so egregious that the true wishes of the employees with respect to union representation are unlikely to be determined through a secret ballot vote.

79. One of the reasons why the Board has been reluctant to order automatic certification is that it is very difficult to argue against the proposition that employees, no matter what their employers view is on union representation, would not cast their ballots, in secret, in accordance *with their own true wishes*.

80. A second major consideration is the fact that automatic certification disfranchises those employees who may wish to exercise their lawful right to choose against union representation.

81. The foregoing consideration takes on even greater significance in light of the current legislation which establishes for the first time in Ontario labour legislation history, the automatic right of all bargaining unit employees to participate in a secret ballot vote with respect to union representation.

82. The question that the Board has to answer is not "did the employer engage in any questionable activity - however minor" - but as noted in Sack and Mitchell - Ontario Labour Board Law and Practice section 3:6100 P. 214:

"...The Board refused to exercise its discretion under section 7(4) to certify without a vote and ordered a vote or a new vote where though the conduct of the employer was *in some degree improper*, it was not such as to make it unlikely that the true wishes of the employee would be disclosed by a vote or a new vote."

(emphasis added)

Again in Sack and Mitchell, section 3.6115 p. 216:

The Board has held that an employer exercising its rights under section 64 need not be neutral on the question of unionization and may indicate that it would prefer employees to vote against the union.

Again with Sack and Mitchell quoting on p. 217 from the case of *Bell & Howell Ltd.*, [1968] OLRB Rep. Oct. 695 at 706:

An employer may express his views and give facts in appropriate manner and circumstances on the issues involved in representation proceedings in so far as these directly affect him and has the right to make appropriate reply to propaganda directed against him in relation thereto. ... He should take care that such expressions of views do not constitute and may not be reasonably construed by his employees to be an attempt by means of *intimidation, threats or other means of coercion*.

(emphasis added)

Again in Sack and Mitchell at paragraph 3:6120 on p. 219:

Not every violation of the Act will result in the Board exercising its discretion under s. 8. Indeed, the Board has said that certification under s. 8 is an extraordinary process given the fact that in most situations employees do not feel unduly influenced when making a secret ballot choice, and given the Board's broad remedial authority under s. 89 to deal with this conduct where it occurs. Thus, in determining whether employer misconduct makes it difficult to ascertain the true wishes of the employees, the Board does not apply the same test as it does in ruling on the voluntariness of an employee petition in a certification application. In the case of a petition very little employer involvement is required to cause the Board to dismiss a petition and certify without ordering a representation vote provided the union has more than 55 percent membership evidence. However, under s. 8, the union must establish substantial employer interference, intimidation or coercion such that the secrecy of the ballot cannot be relied upon as expressing the true wishes of the employees.

(emphasis added)

83. In order to find that the true wishes of the employees cannot be ascertained by a vote, the Board must find that reasonable employees would have to enter the polling booth faced with two compelling alternatives - vote for the union and suffer serious consequences, or suppress the wish to vote for the union and not suffer such consequences. The consequences would have to have arisen and be so found by the Board - out of the contravention of the Act by the employer through the prohibited grounds of coercion, intimidation, threats, promises or undue influence.

84. Not one scintilla of evidence has been adduced to support the majority decision that the events surrounding the staff association and the suspension of Ms. Ward will in any way interfere with or influence the free secret ballot expression of the individual employees true wishes with respect to union representation.

85. In order to support the finding that employees will not be able to express their true wishes in any representation vote, the majority must have evidence that employees contemplating their vote will be faced with the prospect of dire consequences should they vote for the union.

86. The consequences which would result from coercion, intimidation, threats, promises or undue influence would include the threat of the shutting down of a business; the layoff of employees and other threats to their job security; the threat to contract out work and otherwise threaten to intimidate employees. What is the "down side" which the Burlington Golf and Country Club employees must consider when casting their ballot? There isn't any! None has been placed before the Board in evidence.

87. We know from the facts and evidence in this case that there was no coercion, intimidation or threats, promises or undue influence, so how, in the face of a complete absence of supporting evidence does the majority arrive at the conclusion that reasonable employees will not be able to express their true wishes in a representation vote.

88. In support of my contention that the majority has erred in its decision, I quote from *Kanac Kitchens Limited*, [1994] OLRB Rep. Aug. 972, paragraph 65 which reads as follows:

“The Board has generally granted certification without a vote pursuant to section 9.2 in one of two types of situation, as reviewed in *The Globe and Mail*, *supra*, at paragraphs 60 and 61: *where an employer has “made threats to the continued job security of his employees conditional on whether the union succeeded in its attempt to become certified”*; and also *“where the cumulative effect of a range of unlawful employer activities, none of which taken separately might call the section into play, has the effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which gives a reasonable employee the confidence to make a free choice”*.

(emphasis added)

89. As we have shown this instant case, under the reasoning quoted above, would not justify the automatic certification of the respondent - there were no threats made and there was very definitely no “cumulative effect of a range of unlawful employer activity”.

90. In *Upper Canada Furniture Limited*, [1981] OLRB Rep. July 1016 (File No. 2563-80-R and 2645-80-U) the Board found in paragraph 46:

“The employer contravened the Act by discriminating against the union by conferring upon the pro-plant committee supporters a substantial advantage to the foreseeable detriment to the union.”

No such related employer activity occurred in this instant case - not even any suggestion of such activity - yet in the *Upper Canada Furniture Limited*, *supra*, case the Board found in paragraph 47:

“For the reasons set out above the Board is not satisfied, as it must be to grant a certificate under section 7a of the Act, that as a result of the employer’s contravention of the Act the true wishes of the employees are not likely to be ascertained. *We are satisfied in fact that given the nature of the employer’s violation of the Act and the remedies set out below the true wishes of the employees will be revealed in a second representation vote.*”

91. In the above noted paragraph the Board exercised its discretion to order other remedies in the face of a contravention of the Act which did not warrant automatic certification. The majority in this instant case has ignored its right and gave no consideration to exercising its discretion and applying remedies which would precede the taking of a representation vote.

92. In *J.G. Contracting Ltd.*, Board File 0407-95-U (unreported) the Board in a unanimous decision wrote in paragraph 27:

“*Section 9.2 is an extraordinary remedy.* As the language of the section stipulates, it may only be invoked if the Board considers that the true wishes of the employees are not likely to be ascertained because of the employer’s contravention of the Act. For the reasons expressed in the preceding paragraph, we are not persuaded that the employer’s conduct has created a situation where the true wishes of the employees are not likely to be ascertained. *Mr. Fahel’s conduct was an egregious violation of the Act and one which we do not condone. That in and of itself is not, however, grounds for automatic certification.*”

(emphasis added)

In the foregoing reference, we see that even where an employer’s conduct was considered “egregious” an order under section 11 (formerly section 9.2) was not made.

93. The management of the Burlington Golf and Country Club from all of the evidence before this Board can be said to have conducted itself well within any constraints imposed by the Act - and if any characterization need be made of that conduct, it could well be that it was restrained and well within that expected of any employer conscious of, and eager to accept, and uphold its responsibilities.

94. In *Seven-Up/Pure Spring Ottawa*, OLRB files 1146-83-R and 1682-83-U (unreported), the Board found specifically that the employer violated the Act by making what the Board determined was “a threat or promise,” but nevertheless ordered a representation vote preceded by a number of remedies.

Paragraph 35 reads, in part:

“In the circumstances of this case, we believe employees were likely to interpret the third numbered paragraph of the September 23rd letter as meaning that the predicted narrowing of bargainable issues would result from the employer’s response to unionization rather than from anything inherent in collective bargaining. *In short, it would likely be taken as a threat or promise* that the employer would not bargain in good faith with this union if the employees were to select it as their bargaining agent.”

(emphasis added)

Then we read in paragraph 39, in part:

“We have found a violation of the Act ... the question which remains is whether the true wishes of the employees are likely to be ascertained in a new representation vote.”

Again, we read in Paragraph 40:

“Not every violation by an employer of the *Labour Relations Act* creates a climate in which employee wishes can in no circumstances be ascertained. The presence of the third of the pre-conditions to section 8 certification is a question of fact which is determined by the Board on a case by case basis. The factors which have influenced this determination were reviewed by the Board in *The Globe and Mail Division of Canadian Newspapers Company Limited* [1082] OLRB Rep. Feb. 189.”

In paragraph 42, we read, in part:

“We believe that the adverse impact of the respondent’s contravention of the Act can be rectified so as to enable the wishes of the employees to be ascertained in a new representation vote.”

95. The Board in the final analysis refused to grant the s. 11 (then s. 8) application - despite the findings of a violation of the Act - and instead the Board fashioned a series of remedies contained in paragraph 42 to be followed prior to the holding of a new representation vote ordered in paragraph 44.

96. In the case before us the employer made no threats or promises, nor in my view did the employer breach any provisions of the Act, yet the majority imposes the ultimate penalty under s. 11 without any consideration being given to interim remedies leading up to a representation vote.

97. In a Board decision in File No. 3813-95-U, *461804 Ontario Limited o/a Bramalea Rebuilders* the Board found in paragraph 31 and 38:

“31. As indicated by our findings of fact set out above, it is our determination that the decision to implement the layoff was made on Monday, January 22, 1996, *days in advance of the first organizing activity and the employer’s knowledge of the union’s organizing.*”

“38. Having regard to all of the evidence, it is our determination that the union played no part in Bramalea Rebuilders’ decision to lay off the employees in question as the decision was made prior

to any organizing activity and *prior to the employer becoming aware of the organizing drive*. Accordingly, we dismiss the application as it relates to the layoff of the employees named therein.”

(emphasis added)

98. In this instant case it is the uncontradicted and incontrovertible evidence that long before - actually many months before - the union’s organizing drive commenced, the employer engaged in activities directed towards a voluntary staff association. The finding then by the majority that the references by the employer to the Staff Association is in violation of the Act is insupportable and is contrary to Board jurisprudence.

99. In Board files No. 3279-95-R and 3699-95-U, *Maverick Mechanical Contractors* in a decision dated April 16, 1996 [now reported at [1996] OLRB Rep. March/April 289], the Board wrote:

“Para. 22 The language of the section makes clear that certification under section 11 can only be granted if the following conditions are met:

1. The Act has been violated.
2. As a result, a representation vote does not or would not reflect the employees’ true wishes concerning union representation.
3. No remedy, including the taking of another representation vote, would counter the effects of the violation.
4. The union has membership support adequate for the purposes of collective bargaining.”

Paragraph 23 reads in part:

“It is my determination that Mr. Robertson’s conduct violates section 76 of the Act such that the first condition necessary for the application of section 11 has been met.”

(emphasis added)

Paragraph 24 reads, in part:

“... it is my determination that Mr. Robertson’s conduct had the effect of discouraging the employees from attending at the job site on December 8, 1995 and casting a ballot, and, as a result, the results of the vote held on December 8, 1995 do not reflect the true wishes of the employees in the bargaining unit. Thus, the second condition necessary for the application of section 11 has also been met.”

(emphasis added)

Paragraph 25 reads:

“The third condition necessary for the application of section 11 requires the Board to be satisfied that no other remedy, including the taking of another representation vote is sufficient to counter the effects of the violation. The Board has generally granted automatic certification in one of two types of situations. *First, where an employer has made threats to the continued job security of its employees conditional on whether the union succeeded in its attempt to become certified, certification has followed automatically. Alternatively, where the cumulative effect of a range of unlawful employer activities, none of which taken separately might call the section into play, has the effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which give a reasonable employee the confidence to make a free choice the Board has automatically granted certification to the union* (see: *The Globe and Mail*, [1082] OLRB Rep. Feb. 189 at paragraphs 60 and 61).”

100. In the *Maverick Mechanical Contractors* case, paragraph 26 cited above, it was found that “neither of these two scenarios are present”, that is, no threats have been made to job security and no “cumulative effect”. The identical finding can be made in the instant case and therefore automatic certification is not an appropriate remedy.

101. Nothing in the communications or behaviour of any single member of the management of the Burlington Golf and Country Club suggested in any way that continued job security was related to the employees wishes with respect to union representation, nor does any of the evidence support a finding of “... a cumulative effect of a range of unlawful employer activities”.

102. In the above-noted case, the Board found a violation of the Act and ordered that a previous representation vote be set aside as it did “... not reflect the true wishes of the employees in the bargaining unit” (paragraph 24). A new vote was ordered.

103. As stated more fully elsewhere, should the majority believe that there has been a violation of the act - however minor, they can rectify any pre-vote misgivings they believe might be present in the minds of some employees by issuing directions as was done by the Board in the *Maverick Mechanical Contractors Limited* case (*supra*).

104. The union submitted an additional number of cases for our consideration and while none of the cases were on point, they were helpful however in supporting my belief that only under exceptional circumstances would the Board order automatic certification as they did in the following cases. In *Z-Lite Jenamees*, [1995] OLRB Rep. Feb. 212 at paragraph 46:

Viewed objectively, it is reasonable to conclude that employees would have had serious concerns with regard to their job security...

In spite of the Board’s finding that employees would have serious concerns with regard to their job security, the Board, in paragraph 46, stated that the decision to grant the application “...is a close call...”. In *Frade’s Fruit Ltd.*, [1995] OLRB Rep. Feb. 122, the Board certified the union under s. 9.2 (now s. 11) on the basis of the termination of two employees and the distribution of a questionnaire in the workplace - both activities creating a climate of fear in the workplace. The circumstances of the *Frade’s Fruit Ltd.*, *supra*, case are so far removed from this instant case that they cannot be said to be helpful to the union. In our case there were no terminations nor any creation of a climate of fear.

General

105. In paragraph 27 (p.8) *Sara Lee Bakery* File No. 3308-95-R and 3395-95-R [now reported at [1996] OLRB Rep. May/June 480] the Board quoted from *General Freezer Limited*, 63 CLLC ¶16,294 supporting the effectiveness and validity of secret ballot representation votes in writing:

“all of the employees in the bargaining unit have had the opportunity to express their wishes with respect to their choice of a bargaining agent by means of a secret ballot, and therefore the true wishes of the employees have been fully tested.”

(emphasis added)

106. In an information package released by the Ontario Ministry of Labour immediately prior to the introduction of Bill 7, a fact sheet included the following material which is critically significant to the facts, circumstances and outcome of this instant case - it reads in part;

**“FACT SHEET:
ON WORKPLACE DEMOCRACY AMENDMENTS**

INTRODUCTION

The government is introducing amendments to the *Labour Relations Act* designed to enhance democracy in the workplace. *The government is committed to the principle that individual employees must have a free and informed right to choose whether or not to join a trade union, to go on strike or to ratify a contract. The best way to ensure that right is to have secret ballot votes in all cases.*”

(emphasis added)

To deprive the employees at the Burlington Golf and Country Club of their rights enshrined in the Act without reason is a gross violation of their stated and protected legal and democratic rights.

107. The majority decision takes great pains to highlight a comment made by counsel for the respondent in his argument that perhaps the employer might have over-reacted in deciding upon the indefinite suspension of Ms. Ward.

108. In retrospect that was a normal observation considering the difficulties that arose as a result of that decision, but the comment in no way accepts or even implies that the indefinite suspension was incorrect and a breach of the Act.

109. Counsel for the respondent did not say at any time, nor did he imply by his comment, that some form of discipline should not have been imposed upon Ms. Ward.

Summary

Staff Association

110. In the Autumn of 1994 the beginnings of the stated goal of better communications with employees took root with the development of the Employee Evaluation Form, Motivational Questionnaire, and Performance Appraisal form.

111. The process was further developed in April 1995 to the point where the concept of a staff association was firmly fixed in the minds of the Burlington Golf and Country Club management. (During the time covered by this and the above paragraph there was no organizational drive taking place and for that matter no known union presence whatsoever).

112. On 2 June, 1995 in response to employee concerns expressed at previously held training sessions, Ms. Terry Kent raised the matter of a staff association at an all-employee meeting.

113. At the conclusion of the June 2, 1995 meeting Ms. Elizabeth Ward approached Ms. Terry Kent and offered her unsolicited and voluntary support and indeed encouragement to having Mr. Bernd Klahre send out a letter to all employees with respect to the staff association, and Ms. Ward endorsed the offering of a staff association in two very specific and positive ways.

- Ms. Ward advised Ms. Kent that it would be a good idea to send out the letter, and,
- Ms. Ward further advised that the employee association “may be a good alternative” and that she “didn’t think that employees should be subject to just one alternative like a union...”.

114. Ms. Kent testified that the club management heard rumours prior to 2 June, 1995 that Ms. Ward was involved in supporting a union presence in the workplace and was also aware of the leadership role of Ms. Ward played among the club's staff.

115. Having encouraged the employer to follow a specific course of action, action which we have seen to be well within that allowed by the Act, it does not now lie in the mouth of the union to claim that that action breached the Act.

116. Ms. Kent's actions and the subsequent communications by Mr. Klahre which stressed the voluntary aspect of the employee's consideration of the staff association concept, quite apart from Ms. Ward's definitive support, were in every way legitimate. For the chief in-house union organizer to lure - *if that was Ms. Ward's plan all along* - the club management into activity that would support a union application under s. 11 of the Act is unconscionable and the union should not now profit by Ms. Ward's duplicity.

117. It was quite legitimate for the employer to continue to ascertain the degree of interest among the employees for a staff association. The development of the concept predated the appearance of a union on the scene and if for no other reason than the "business as usual" principles long recognized and supported by the Board the majority should find the employers actions to be well within protected activity under the Act.

Disciplinary Action

118. The employer had cause to discipline Ms. Ward for leaving her work station without permission to engage in union organizing activity - activity which is not protected activity under the Act.

119. The majority decision agrees with the above but appears to take issue with the form of that discipline.

120. As I have shown in paragraphs 61 to 64 inclusive of this dissent that the form of discipline taken by the employer was legitimate and appropriate under the circumstances and followed the norms employed by practitioners on the Ontario labour relations scene.

121. The disciplinary matter was settled voluntarily by the parties and there was no evidence adduced to suggest - even the remotest possibility - that the issue supports the majority's finding of coercion, intimidation, threats, promises, or undue influence, nor is there any evidence that the discipline imposed (and settled to the union's satisfaction) "...does not or would not likely reflect the true wishes of the employees..." in the holding of a representation vote.

Communications

122. The employer consistently in its written communications advised employees of their right to become or refrain from becoming a member of the union, and that employees wishing to sign a union membership card are free to do so.

123. Nothing in any of the employer's verbal or written communications can in any way support the majority's finding of coercion, intimidation, threats, promises or undue influence, nor is there any evidence that the employer's communications with employees would in the holding of a representation vote, so influence the employees that such vote "... does not or would not likely reflect the true wishes of the employees".

Legislation

124. The Act mandates that in all certification applications, s. 8(2) "...The Board shall direct that a representation vote be taken ...".

125. And, in s. 8(6) "The representation vote shall be by ballots cast in such a manner that individuals expressing their choice cannot be identified with the choice made."

126. It should go without saying that to deny employees their explicit rights under the Act should only be done under extraordinary circumstances - circumstances that are notoriously absent in this instant case.

127. The result of the majority decision to grant automatic certification disfranchises almost one-half of those employees who were employed at the time of the application for certification.

128. To deny these employees their rights under the Act to a democratically held secret ballot vote with respect to their wishes in regard to union representation under the circumstances of this case is a travesty of justice.

129. Having been denied the opportunity to participate in the organizing campaign - we heard evidence that the organizers selected for the signing of union membership cards only those employees with whom they felt comfortable - an understandable strategy but nonetheless an exclusionary one - those employees who were not canvassed by the union organizers or who were canvassed but declined will now find themselves in a unionized workplace to which, according to Ms. Ward, a number of them were "adamantly" opposed, without their having been given the right, which is theirs under the Act to express their true wishes by means of a secret ballot vote with respect to union representation.

130. Those employees effectively disenfranchised by the majority decision will have great concern for its manifest injustice.

131. There has been no breach of the Act - and even if the majority believes that such breach did in fact occur - it is such a minor nature as to fly in the face of previous Board jurisprudence when adjudicating cases involving automatic certification under s. 11 (or its predecessors) of the Act.

132. Clearly the majority has failed to demonstrate where there has been coercion, intimidation, threats, promises or undue influence; has failed to make a case or any breach of the Act; and has failed to show why the true wishes of the employees cannot be ascertained through a secret ballot representation vote.

133. If for reasons that elude me, the majority finds that some of the employer's actions are in some way troublesome, the Board has the discretion, and has exercised such discretion in the past in response to s. 11 applications, to order a vote, but also to impose specific remedies designed to offset what the Board believes to be that troubling activity.

134. Another very important matter that is not addressed by the majority decision concerns the composition of the bargaining unit. The bargaining unit at the time of the release of this decision - could be substantially different than that in existence at the time of the application. It is therefore imperative, if the Board is to comply with the pertinent provisions of the Act that in order to determine the true wishes of the employees with respect to union representation that a secret ballot vote be held.

135. I cannot agree with the majority decision which fails to show any violation of the Act or for that matter any behaviour on the part of the employer that warrants such a decision based even on previous board jurisprudence, which developed under a materially and significantly different Act.

136. The evidence fails to show any violation of the Act - and even if we accept the majority view that minor violations of the Act did occur (a finding I find to be totally insupportable) a remedy short of automatic certification would be a more appropriate response by the Board.

137. With respect to section 11(1) of the Act, I find under the circumstances of this case that:

1. The employer did not contravene the Act and the majority fail to establish this in their decision.
2. Even if the majority are correct on their finding of a contravention of the Act, the contravention as described in the majority decision is of such a minor and insignificant nature as to overrule any finding by the majority "... that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union."
3. The majority failed to consider the requirements of subsection (3) of section 11(1) in that it did not put its mind to the matter of other remedies. It is significant to note that this sub-section of the Act provides for the taking of another representation vote in instances where a representation vote has already been taken.
4. The trade union may or may not have adequate membership support for the purposes of collective bargaining. The changes in the numbers of employees and their job classifications makes it even more imperative that a representative vote be ordered by the Board.

138. For the majority to grant automatic certification without a vote under the circumstances of this case is patently unreasonable.

139. For all of the reasons recorded in this dissent I would dismiss the application and order, as required by the Act, a representation vote.

CONCURRING OPINION OF BOARD MEMBER PAT V. GRASSO; August 12, 1996

1. This is a simple case. As such, there is no need for a lengthy concurring opinion.
2. I concur with the findings of fact of the Vice-Chair.
3. This is an application for certification. The issues raised are (1) whether the employer contravened the Act, and (2) if so, whether the appropriate remedy is automatic certification under section 11 of the Act.

Did the employer contravene the Act?

4. As soon as the union's organizing drive became known to management, it panicked and began to promote an employee association. It quickly moved to identify those individuals who might be willing to support an employee association, and then worked with them in an attempt to frustrate the union organizing drive.
5. Top level management claimed that it had discussed the idea of an association well before the time of the organizing drive. Even if this is so, it is abundantly clear that the idea lay dormant until after the organizing drive started. Only after it had knowledge of the drive did management spend any

time and energy -- in fact, a great deal of time and energy -- getting the association off the ground. Management arranged the initial meeting with employees to discuss the association, provided facilities for association meetings, and changed employees' hours of work and paid them in order to promote and reward greater meeting attendance. Moreover, members of management were present for at least some portion of each of these meetings and knew who attended and who did not. Management knew who spoke in favour of the association. To cite but one example of employer interference in the union organizing campaign and involvement in the formation of the association, I refer to a letter dated June 8, 1995 that was included with employees' pay envelopes. Paragraphs 4, 5, and 6 of the letter read:

Burlington Golf & Country Club would *provide the necessary assistance* to establish such an association.

Please indicate your preference below, detach and leave the questionnaire in confidence with Gail or Carolyn before June 19th, 1995. (emphasis added)

Please participate in this exciting opportunity.

6. The suggestion offered in paragraph 43 of the dissenting opinion that the association was nothing more than an innocuous vehicle to facilitate "good work relationships" between the employer and employees is simply not supported by the evidence.

7. On the other side of the coin, when the company caught a single union supporter conducting some brief union business on company time, it indefinitely suspended her. The fact, as suggested by the dissent, that she was returned to her job 3 weeks later as part of a settlement of an unfair labour practice complaint hardly works to the employer's advantage; indeed, as far as I can recall, it was a matter which, as the result of the *employer's* objection, was not to form part of the evidence. In any event, to suggest that "the form of discipline taken by the employer was legitimate and appropriate under the circumstances and followed the norms employed by the practitioners on the Ontario labour relations scene" is something entirely beyond my experience. To ask the question whether Ms. Ward would have been suspended had she spent the same amount of time encouraging an employee to support the association is to answer it.

Is the appropriate remedy to grant automatic certification under section 11 of the Act?

8. There is no issue that the union has established membership support adequate for collective bargaining as required by s.11: 54.5% support is only fractionally short of the amount by which the union could have been certified without a vote under the legislation in place at the time the application was filed.

9. In determining whether to grant an automatic certification, we must evaluate the employer's behaviour in the context of this employer's workplace and these employees. The evidence established a prolonged anti-union campaign by the employer, culminating in the indefinite suspension of the lead inside organizer. It is important to note that the employer's support for an employee association and its treatment of the inside organizer did not occur in isolation, but in juxtaposition. On the one hand, the employer was actively promoting an employee association on company time and company property. On the other, the lead inside organizer was suspended indefinitely for the single documented incident of trade union organizing at the workplace. The message to the employees from such disparate treatment is clear: support the association and you have management's support and blessing; support the union and your job is at risk. It is simply not reasonable to expect that employees who have been worked over in this fashion for a period of more than two months would be able to express their true wishes in a representation vote. There is no question in my mind that automatic certification is the only appropriate remedy in the circumstances.

0781-96-U United Food & Commercial Workers International Union, Soft Drink Workers Joint Local Executive Council, Applicant, v. **Coca-Cola Bottling Ltd.**, Responding Party

Evidence - Lock-Out - Practice and Procedure - Board declining to permit union to "split its case" by leading certain reply evidence - Proposed reply evidence also improper as counsel had failed to satisfy requirements in rule in Browne v. Dunn - Union alleging unlawful lock-out in context of plant closure in Peterborough and opening of new facility in Cobourg - Decision to close down Peterborough facility irrevocable - Employer offering to voluntarily recognize union at Cobourg plant, but only on terms and conditions that were preferable (from its perspective) to those contained in Peterborough collective agreement - Evidence not establishing that employer's intention to send message to employees destined for Cobourg about benefit of union representation - Unlawful lock-out application dismissed

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *Elliott G. Posen, Melvin Rotman, and Dennis Krajaefski* for the applicant; *Gita Anand, Clifford J. Hart, Jim Nemeth, Ray Nolan and Wayne Sponagle* for the responding party.

DECISION OF THE BOARD; July 17, 1996

I. Introduction

1. The name of the responding party is amended to read "Coca-Cola Bottling Ltd.".
2. This is an application brought before the Board pursuant to section 101 of the *Labour Relations Act, 1995* ("the Act"), in which it is asserted that the responding party (hereinafter referred to as "Coca-Cola" or "the employer") has unlawfully locked out members of the applicant (hereinafter referred to as "UFCW" or "the union"). This application was filed with the Board on June 12, 1996. The matter came on for hearing on June 20, 1996, and continued on June 24 and 25, 1996. At the conclusion of the hearing, the Board reserved on its decision.

II. Evidentiary Matters

3. During the course of the hearing, it was necessary to make a ruling respecting the proper scope of reply evidence to be called by the union. As will become evident from the facts set out below, the unlawful lock-out allegations brought by the UFCW are brought in the context of a plant closure in Peterborough, Ontario. The employer offered employment at its new facility in Cobourg, Ontario to 14 of the 24 employees previously employed in Peterborough. The union asserts that the employer's decision to not offer employment to six of its former employees was based upon the individuals' involvement with the union. The employer states that it made offers to its best employees, and denies the union's allegations.
4. The union, which the Board ruled would proceed first, called Mr. Dennis Krajaefski, President of the Soft Drink Workers' Joint Local Executive Council, as its only witness. No testimony was adduced through Mr. Krajaefski regarding the work records, disciplinary records, "attitude", lateness or absenteeism of any of the individuals previously employed at the Peterborough facility. Mr. Wayne Sponagle, the General Sales Manager for the employer's Northern and Eastern Regions, subsequently testified on behalf of the employer. Mr. Sponagle testified that the management group of the Peterborough facility determined the identities of who would be offered positions at Cobourg, and that one of the grounds upon which the decision was based was the "attitude" of the employees. In

cross-examination, Mr. Sponagle was asked just what the concept of “attitude” meant to him. He could not satisfactorily answer that question. However, he testified that it was the management group at Peterborough that made the hiring decisions for Cobourg based on that criterion, and not him.

5. At the end of Mr. Sponagle’s testimony, counsel for the employer closed her client’s case. Mr. Rotman, counsel for the union, called Mr. Larry Pluard, one of the ten employees not offered a position at Cobourg, to give reply evidence. After the usual introductory questions, Mr. Pluard was asked whether he had a discipline record while employed by the employer, which question brought an immediate objection from opposing counsel. After the witness was excused, counsel argued whether the question and others to be asked was proper reply evidence. After entertaining argument, the Board ruled that the question, as well as a further line of questions to be asked regarding Mr. Pluard’s absenteeism record, his lateness, his participation in training, and his “attitude”, was inappropriate reply evidence and therefore that the objection was sustained. After that ruling, counsel for the union indicated that the proceeding could move to argument.

6. The Board wishes to outline why the question posed (and those about to be posed) were inappropriate.

7. It is important to recognize that there is a very limited right of reply in most litigious proceedings. In Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (Butterworths, 1992), at p. 880 et seq., the authors observe as follows:

A. Limits on Reply Evidence

At the close of the defendant’s case, the plaintiff or Crown has a right to adduce rebuttal evidence to contradict or qualify new facts or issues raised in defence. The general rule in civil cases is that matters which might properly be considered to form part of the plaintiff’s case in chief are to be excluded. As for criminal cases, Martin J.A. said in *R. v. Campbell*:

The general rule with respect to the order of proof is that the prosecution must introduce all the evidence in its possession upon which it relies as probative of guilt, before closing its case.

Two very practical rationales for this rule were articulated by Wigmore:

... first, the possible unfairness of an opponent who has unjustly supposed that the case in chief was the entire case which he had to meet, and, second, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning. ...

... In civil cases the discretion is wider and should be exercised in light of the broad principles which are the basis for the restriction on reply evidence. These principles are designed to ensure that the defendant knows the case to be met and that the plaintiff not be permitted to split his or her case. The rationale for the latter principle is that trials should not be unduly prolonged by creating a need for surrebuttal. Within these broad parameters the trial judge has a discretion to permit reply evidence when it is the reasonable and proper course to follow.

(footnotes omitted)

In civil proceedings, therefore, a party is entitled to call reply evidence for the purpose of addressing those matters raised by the opposing party for the first time in its case; that is, to address those matters which could not have been fairly anticipated by the party when initially calling its case. The rationale for such a limited rule is evident - the party responding to a case is entitled to know the entire case that it faces, because it will have no further opportunity to call any evidence (see the discussion of the rule in *Tate Andale Inc.*, [1993] OLRB Rep. Apr. 383, at paras 41 et seq.).

8. It appeared to the Board that counsel for the union was effectively splitting his case by calling reply evidence of the nature described above. The union did not, in its case in chief, call any evidence respecting the work records, discipline records, lateness, absenteeism or "attitude" of the individuals previously employed at the Peterborough facility, except through Mr. Krajaefski, who stated that he had no knowledge of the disciplinary records of the ten employees not offered positions in Cobourg. In the employer's case in chief, Mr. Sponagle was not asked any questions regarding the criteria that the employer used to determine who would be offered positions in Cobourg. As noted earlier, in cross-examination, Mr. Sponagle testified that the decision to not offer employment to the ten individuals was not his and that he could not define the concept of "attitude" as applied by the management group at Peterborough.

9. This issue (i.e. the basis for not offering employment to 10 of 24 employees from Peterborough) was not one which had been raised by the employer in its case. Without a doubt Mr. Sponagle was asked questions regarding "attitude" in cross-examination, but his answering of those questions can hardly be considered to be "raising the issue" on behalf of the employer. Nor were the issues sought to be questioned upon by the union incapable of being anticipated by the union; in fact, the union *did* attempt to adduce evidence of that nature through Mr. Krajaefski, but he acknowledged his limited knowledge of the discipline records of the ten individuals. If the union had desired to raise the factor of "attitude", or any of the other criteria desired to be raised through Mr. Pluard, it could easily have done so in examination in chief.

10. But there are other reasons why the questioning on these issues was not permitted. Quite simply, the questions were not relevant, based on the evidence given to date, and the pleadings filed with the Board. After the completion of Mr. Sponagle's cross-examination, there was no evidence at all before the Board regarding the significance of the disciplinary records, lateness or absenteeism of the ten persons not offered positions at Cobourg, nor was there evidence respecting the meaning of the term "attitude", as Mr. Nolan and the management group at Peterborough understood it. All that had been established was Mr. Sponagle's knowledge that that latter concept - whatever it means - was a criterion utilized by Mr. Nolan and the management group at Peterborough. To hear Mr. Pluard describe his disciplinary record, absenteeism or lateness record, or his "attitude" would have been entirely unhelpful, because the Board has no idea what factors, except "attitude", the decision-makers actually did consider relevant. Even if the concept of "attitude" could be gauged, its applicability to the failure to offer employment, in the context of this case, would only be helpful if the *relative* "attitudes" of all 24 former employees at Peterborough were known, and Mr. Pluard could hardly have testified to that.

11. Finally, all of the questions were also improper for the reason that counsel for the union had not satisfied the requirements in the rule of *Browne v. Dunn* (1893), 6 R 67 (H.L.). Counsel for the union did not, in the cross-examination of Mr. Sponagle, indicate to the witness what the evidence of Mr. Pluard respecting his work record, discipline record, "attitude", lateness and absenteeism would be. However, counsel for the union conceded during argument that the answers to be given by Mr. Pluard would be utilized by the union to challenge Mr. Sponagle's credibility. The unfairness of doing so is obvious. Furthermore, had counsel put Mr. Sponagle on notice of his intention to call evidence of that nature, counsel for the employer may well have called evidence respecting these issues before closing her case. As it turned out, she did not, because there was no suggestion that any of these matters would be put into issue in reply evidence. In the Board's view, it was far too late to unravel the case to rectify this fundamental problem.

12. For all of the above reasons, the Board refused to allow the questions to be asked to Mr. Pluard respecting discipline records, work records, absenteeism, lateness, and "attitude".

III. The Facts

13. The salient facts were not largely in dispute. The parties, prior to the commencement of the calling of evidence, agreed to a number of facts contained in the pleadings filed with the Board. As noted above, in addition to the agreed-upon facts, the UFCW adduced evidence from Mr. Dennis Krajaefski, and the employer adduced evidence through Mr. Wayne Sponagle. The testimony of both Mr. Krajaefski and Mr. Sponagle was given in a forthright and credible manner.

14. Having regard to the agreement of the parties, and the testimony of Messrs. Krajaefski and Sponagle, the Board makes the following findings of fact.

15. The employer is a bottler and distributor of beverages in Ontario. The union is the bargaining agent for a bargaining unit of the employer in Peterborough, Ontario, and has been for many years. The union also represents a number of employees of the employer in numerous other locations throughout the province of Ontario. Prior to April, 1996, the employer had been located in Peterborough for approximately 70 years. It most recently operated a distribution warehouse in Peterborough, and employed approximately 24 employees at that location. The employees who worked at the Peterborough distribution warehouse included "inside employees" such as labourers, shipper/receivers, and sales equipment service technicians, as well as "outside employees" such as Delivery Salesmen-In-Charge.

16. The union and the employer were parties to a collective agreement which was in effect from July 27, 1992 to July 23, 1995. On or about July 17, 1995, the employer received a notice of desire to bargain a renewal collective agreement from the union. Mr. Krajaefski met with Mr. Sponagle and Mr. Jim Nemeth, the employer's Industrial Relations Manager, Ontario Division, in Ottawa on August 29, 1995, when they were negotiating a collective agreement for the Ottawa bargaining unit. At that time, there was a discussion regarding the Peterborough situation. Messrs. Sponagle and Nemeth advised Mr. Krajaefski that the Peterborough facility was most likely going to be moved in late 1995 or early 1996, and requested that negotiations be deferred until the situation was clarified. The union and the employer agreed that, while the employer's plans were being finalized for Peterborough, the parties would concentrate their negotiation efforts on other agreements up for renewal. It was agreed that, once the employer was in a position to advise the union of what specific actions were planned, and a time-table was established, negotiations would commence. At that time, Mr. Krajaefski was aware that the building previously owned by Coca-Cola in Peterborough had been sold, and that the employer had temporarily moved into another facility on Park Street in Peterborough. Mr. Krajaefski was aware that the employer's concern was whether it would remain in Peterborough. Mr. Krajaefski shared this concern.

17. During October, 1995, Mr. Krajaefski and counsel for the union each wrote to Mr. Nemeth and somewhat surprisingly (and forcefully) requested that the employer meet to negotiate a renewal collective agreement for Peterborough. Mr. Nemeth, in his response to Mr. Krajaefski, indicated some confusion regarding the situation in light of what he believed to be an "agreed-upon understanding" regarding the deferral of bargaining of the Peterborough agreement. Mr. Nemeth indicated that the employer was prepared to meet with Mr. Krajaefski and the union, and subsequently the parties did meet on December 14, 1995.

18. The December 14, 1995 meeting was attended, on behalf of the employer, by Mr. Sponagle, Mr. Nemeth, and Mr. Ray Nolan (the employer's Peterborough Sales Manager), amongst others. Attending on behalf of the union was Mr. Krajaefski, Mr. Paul Donoghue (the Local President), Mr. Larry Pluard (the Local union steward), and Mr. Andrew Hunter (an employee on the negotiating committee). The meeting was not a typical negotiation meeting, and was more of a "question and answer" session. At the meeting, the employer, largely through Mr. Sponagle, advised the union that the Peterborough distribution centre would be closing and that the work from the facility would be moving to Cobourg on or about April 1, 1996. Discussions thereupon centred around the business

reasons for the decision to move, and what would happen to the employees then employed in Peterborough. Mr. Sponagle indicated that the employer would choose those employees who would be offered positions in Cobourg, and that some employees who had “an attitude problem” would not be going. Mr. Sponagle did not elaborate on this concept; nor did Mr. Krajaefski ask Mr. Sponagle to define this criterion.

19. At this meeting in December, 1995, there was some discussion about voluntary recognition of the union at the Cobourg facility, as the collective agreement previously in force in Peterborough has a geographic scope limited to the city of Peterborough. There is no dispute that the employer indicated its willingness to voluntarily recognize the union for the new facility, but only “if the contract was right”.

20. The next meeting of the parties respecting the situation developing in Peterborough was on February 27, 1996, in Peterborough. Mr. Krajaefski had requested, in January, that the parties meet to bargain a labour adjustment plan for the Peterborough location. This meeting was convened in response to that request. There was discussion regarding the closure of the facility, and the employees who would be affected. Voluntary recognition was also a topic of discussion. However, the employer did not desire to discuss the issue of voluntary recognition in the presence of employees who would not be offered a position in Cobourg.

21. In that regard, it should be noted that, approximately three weeks earlier, the employer had notified ten employees at the Peterborough facility that they would not be offered a position at Cobourg. The management group at Peterborough, headed up by Mr. Nolan, the Sales Manager, made the decisions as to which employees would not be offered a position at Cobourg. Included in the ten employees were Messrs. Donoghue, Pluard, and Hunter. It appears from the evidence that, of the ten persons not offered employment in Cobourg, four had previously been members of the union executive and two others had been on the union’s negotiating committee from time to time. Of the 14 individuals offered a position at Cobourg, only one had previous involvement with the union, and that individual had experience not at Peterborough but at the employer’s former plant in Uxbridge.

22. At this meeting in late February, 1996, Mr. Krajaefski was advised that the last date of operations at the Peterborough facility would be March 29, 1996, and that the start-up date at the Cobourg facility would be April 1, 1996. At the conclusion of the meeting, Mr. Krajaefski met with Mr. Nemeth in a hallway and was provided with a draft collective agreement for the Cobourg facility. The collective agreement as drafted is said to be effective as of the date of execution, and is to expire on February 28, 1999. There was no discussion regarding the agreement, as Mr. Krajaefski required time to review it. However, it was made clear to the union that the employer would be prepared to voluntarily recognize the union as the bargaining agent of the employees in Cobourg location on the condition that it agree to the employer’s proposals as to the terms and conditions for a collective agreement.

23. Mr. Krajaefski reviewed the proposed collective agreement for Cobourg and compared it with the agreement applicable to the Peterborough facility. To say the least, it compares unfavourably with respect to fundamental terms and conditions of employment such as wages and benefits, hours of work, and overtime. There are, in fact, over 50 changes in substance to the Peterborough contract. Mr. Krajaefski conceded that some of his union’s contracts contained similar clauses, though not to the same extent reflected by the draft Cobourg agreement. On March 11, 1996, the employer and the union met in order to discuss the conditions upon which voluntary recognition in Cobourg would be granted. No agreement was reached. It was left to Mr. Krajaefski to get back to the employer regarding the acceptability of the draft agreement. Mr. Krajaefski eventually advised Mr. Nemeth that he could not agree to the draft agreement. Mr. Krajaefski did not attempt to negotiate terms of the document because the employer had made it quite clear that the terms of the voluntary recognition would be those

contained in the draft provided to the union. Ultimately, the move to Cobourg proceeded on schedule, and only 14 of the 24 employees previously employed by Coca-Cola in Peterborough continued their employment in Cobourg.

24. The Board heard evidence from Mr. Sponagle regarding the corporate rationale for closing the Peterborough facility. In 1993, the employer determined that it did not want to remain in “the real estate business” and decided to sell its realty in Ontario, in particular several buildings. In accordance with this decision, several buildings, including those in Barrie, Kingston, Cornwall, Ottawa and Peterborough, were sold by the employer by the end of 1995. In Kingston, Barrie and Ottawa, facilities were subsequently leased (or leased-back) by Coca-Cola. The employer discontinued its Cornwall operations.

25. The employer had been located in Peterborough on Rye Street for quite some time. However, the building was not particularly well-suited for its purpose as a distribution centre (it was not the proper shape, size, and had inadequate loading docks, as well as old office space). When the employer determined to sell the building, it commenced a search, through its real estate broker, for a suitable new location in Peterborough. It eventually became apparent that there were no suitable premises in Peterborough for relocation. The employer was required to move out of its Rye Street facility once it had sold the building, and in August, 1995, it found temporary premises in Peterborough which suffered from the same general problems that were incurred by the employer at Rye Street. Accordingly, the employer, through its “logistics and real estate people”, commenced a search for alternative premises along the “401 corridor” in August or September, 1995. For some time the employer had been operating a “modified cross-dock” inventory system (in effect, a “just-in-time”-type of system) and required less space.

26. The employer’s logistics people had concluded that the employer’s operations would be more cost effective along the “401 corridor”, and presented their business case for so doing to management, suggesting that the “401 corridor” was a good location for the distribution centre, particularly if the Belleville and Trenton areas were serviced by the facility. By December, 1995, premises in Cobourg were located which met the employer’s physical requirements, and the facility was leased in early 1996. The physical layout of the premises is appropriate for the inventory system utilized by the employer. More significantly, the plant’s location in Cobourg permitted the employer to shift some of its work from its Kingston facility to the Cobourg building.

27. The costing documentation submitted into evidence supports the conclusion that savings of approximately \$160,000 per year can be achieved by locating a distribution centre on “the 401 corridor”, and by servicing the Peterborough area, as well as Trenton and Belleville, from that facility. The employer determined that the Cobourg site was better in terms of servicing the trade, eliminating the back-tracking of deliveries, and servicing customers. Significant cost savings would also be generated. The cost savings are achieved partly through lower real estate and transportation costs, but are chiefly achieved by wage differentials in the Cobourg area, as compared with the wage levels previously paid in Peterborough. It is evident that the increased volume carried by the Cobourg facility effectively lowered the “blended rate” anticipated by the employer, thus making the Cobourg facility more cost effective. Mr. Sponagle conceded in cross-examination that one of the key elements in the move and the success of same was the wage rate to be paid in Cobourg.

28. The current lease held by Coca-Cola for the facilities in Cobourg is for a five-year term, commencing on March 1, 1996, and expiring on February 28, 2001. The lease permits Coca-Cola the right to terminate the lease on February 28, 1999, upon 180 days prior written notice, accompanied by payment to the landlord of the remaining unamortized portion of any leasehold improvements. According to Mr. Sponagle, this clause is intended to provide Coca-Cola with flexibility, should it be

necessary to terminate the lease because of a “changing business environment”, and has been included in other leases signed by the employer. The lease also provides Coca-Cola with the option to renew the tenancy for two additional periods of one year each.

29. On June 12, 1996, this application was filed with the Board. Filed at the same time were a number of unfair labour practice complaints asserting various violations of the Act. This proceeding came on for hearing on June 20, 1996, and the parties agreed that this panel of the Board could hear and determine the unlawful lock-out application, and that the other applications would be processed and heard by another panel of the Board.

IV. Legal Principles and Argument

30. The legal principles applicable to the case at hand are not in dispute. The definition of the term “lock-out” is found at section 1(1) of the Act, and reads as follows:

1. (1) In this Act,

“lock-out” includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of employees, with a view to compel or induce the employees, or to aid another employer to compel or induce that employer’s employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers’ organization, the trade union, or the employees

31. It is evident from the above definition that the concept of a lock-out encompasses both an objective act and a subjective motive. The applicant must establish, on the balance of probabilities, that the responding party has resorted to certain economic sanctions (which include, but are not limited to, the closing of a place of employment, a suspension of work, and a refusal to continue to employ a number of employees). The applicant must further establish that the economic sanctions resorted to by the responding party were intended “... to compel or induce his employees ... to refrain from exercising any rights or privileges under [the] Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer ... the trade union or the employees”.

32. There is no dispute that, having regard to the provisions of the Act, the employer’s closure of the Peterborough facility would be unlawful if it were established to constitute a “lock-out”. The parties have not yet exhausted the conciliation process contained in the Act.

33. As one might expect, it is the second arm of the above definition - the subjective motivation - that is the most difficult component for the union to establish, because in proceedings such as this one there will rarely be direct evidence of the employer’s motive. This particular proceeding is no different in that respect, as there is no dispute that the union has established the objective component of the lock-out - the closure of the Peterborough facility. The outcome of this proceeding will be determined by consideration of the motivation of the employer for closing that facility, and whether there is sufficient evidence before the Board for the conclusion to be reached that the employer closed the Peterborough facility for one of the purposes outlined above; that is, to compel its employees from exercising any rights under the Act, or to compel them to agree to provisions or changes in provisions respecting the terms or conditions of their employment.

34. A review of the Board’s case law establishes that one technique utilized by the Board to determine an employer’s motivation when a plant is closed is to consider whether the decision to close the place of operations is revocable or irrevocable. A revocable decision to close a facility permits for the conclusion that the responding party designed its conduct for the purpose of bargaining with its

employees with respect to the terms and conditions of employment. On the other hand, if the decision to close a place of operations is irrevocable, that may suggest to the Board that the responding party employer was not utilizing the closure to bargain with its employees regarding terms and conditions of employment. For cases that have described this approach, see *Harry Woods Transport Limited*, [1976] OLRB Rep. July 341; *Rondar Services Limited*, [1977] OLRB Rep. Oct. 655; *Canada Valve Limited*, [1979] OLRB Rep. Aug. 731; and *Doral Construction Limited*, [1980] OLRB Rep. Mar 310.

35. However, even irrevocable decisions to close all or part of a place of operations may be determined to constitute a lock-out for the purposes of the Act. Consider the comments of the Board in *Rondar Services Limited*, *supra*, at paragraph 15:

Does this mean that in order to establish that a lock-out has occurred a union must establish that the decision taken by the company in respect of those it refuses to continue to employ was a revocable one? The answer is no. ... The definition [of the term "lock-out"] contemplates and catches an irrevocable decision taken by an employer to refuse to continue to employ *some* of his employees with a view to compel or induce *other* employees to refrain from exercising rights under the Act etc. ... If it can be shown that an employer's refusal to continue to employ a number of his employees is rooted in an anti-union animus and if there are other employees who may be influenced within the meaning of the definition, an inference can be drawn that the motive for the employer's action falls within the statutory definition of "lock-out". It can be inferred that the employer's decision is designed, at least in part, to modify or alter the behaviour or conduct of those employees who remain in his employ.

See, as well, *Doral Construction Limited*, *supra*, at para. 12.

36. The decision by the employer to close down the Peterborough facility was, on the evidence before the Board, clearly one which was irrevocable. The evidence establishes that, by December, 1995, the decision to close the Peterborough facility and to open a new distribution centre at Cobourg had been made by the employer, and there was no suggestion in the evidence (nor by counsel for the union) that the decision to close was in any way communicated by the employer to the union as being tentative, conditional or subject to change. Notwithstanding the irrevocability of the decision to close the Peterborough facility, the Board may yet conclude that the decision to close constitutes a lock-out for the purposes of the Act - if it is established that the closure of the facility was effected by the employer in order to compel or induce the employees not directly affected by the decision to refrain from exercising rights under the Act or to alter their working conditions.

37. Does the evidence before the Board establish one or both of those purposes? During argument, counsel for the union conceded that the evidence before the Board did establish some legitimate economic basis for the closure of the Peterborough distribution centre and the subsequent opening of the Cobourg facility. However, counsel submitted that the Board could infer from some of the evidence that *one* of the purposes of the employer in closing Peterborough's facility was to convince some of its employees - particularly the 14 employees who became employed in Cobourg - to not exercise their right to organize, or to agree to different terms and conditions of employment.

38. Counsel for the union focused on certain facts adduced during the testimony of Mr. Sponagle. It was noted that the employer did not offer employment at the Cobourg facility to ten individuals, and that most of those individuals had actively participated in the union. Of the 14 individuals offered employment, only one had participated in the union, and he had not done so in Peterborough. The basis for the refusal to offer employment, at least in part, was the "attitude" of the workers, which counsel invited the Board to equate to "union participant".

39. Also noted by counsel for the union was the employer's attempt to impose a collective agreement on the Cobourg facility in exchange for voluntary recognition. Counsel noted the disparity in the terms of the Cobourg draft collective agreement when compared with those enjoyed by the

employees in Peterborough, and also noted the coincidence in the proposed expiry date of the Cobourg draft collective agreement with one of the possible expiry dates of the employer's lease for the Cobourg facility. All of this evidence, it was submitted, ought to lead the Board to conclude that the employer, at least in part, had intended the closure of the Peterborough facility to induce its remaining employees to either refrain from exercising rights under the Act or to accept alterations to their working conditions.

V. Decision

40. Taking into account all of the evidence before the Board, the union has not established, on the balance of probabilities, that the employer has, at least in part, closed its Peterborough facility in order to induce its employees to refrain from exercising rights under the Act, or to alter their working conditions. There is no direct evidence of any improper motivation held by the employer, and accordingly the Board is limited to drawing inferences from all of the evidence before it. On balance, the inferences to be drawn from the evidence do not lead to the conclusion that the employer's motivation in closing the facility in Peterborough was an improper one.

41. The Board's analysis must commence with the consideration that the employer searched Peterborough for alternative facilities before commencing its search for facilities elsewhere. There was no suggestion by the union (because there was no evidence called to support such a suggestion) that the employer's assessment of the inappropriateness of its premises in Peterborough was in any way misguided or incorrect. Nor was there a suggestion that the employer's search for an appropriate facility in Peterborough was a sham. Accordingly, we must commence our analysis from the premise that the employer's Rye Street facility was not suited for its current use, and that there were no other facilities in Peterborough which could accommodate the employer's needs. In such circumstances, there was absolutely no option for the employer, which desired to maintain a distribution centre in the general proximity, but to look beyond the city of Peterborough.

42. There is no doubt that a major determining factor in the employer's decision to locate its distribution facility in Cobourg was the cost of local labour. In *Federated Co-Operatives Limited*, [1980] 1 Can LRBR 372, the British Columbia Labour Relations Board dealt with a situation which has some parallels to that before the Board; namely, the closure of a distribution centre which was alleged to have been effected for improper motives, and therefore to constitute a lock-out for the purposes of the B.C. *Labour Code*. At pp. 378 and 379, the Board dealt with the submission that the Board ought to infer improper motivation from the fact that labour costs were the largest single area of savings for the responding party employer:

...the largest single area of savings is apparently the reduced cost of labour. That factor is, however, a legitimate economic consideration to an employer and the fact that it happens to be an important one in these circumstances does not alter the quality of the economic judgement made by FCL...

Here, the evidence establishes that the decision to move outside of Peterborough had been made by Coca-Cola by the end of August, 1995, and that certain wage studies were completed by the employer during September, 1995. Ultimately, the decision as to where to locate the new facility outside of Peterborough was made by taking into account labour costs. There quite simply is nothing wrong with doing so, as the decision to leave Peterborough (for appropriate reasons) had already been made. That is, the labour costs outside of Peterborough did not drive the employer's departure. Rather, the employer's imminent departure from Peterborough because of a lack of adequate facilities drove its enquiry into the relative wage rates in other locales on the 401 corridor.

43. The evidence establishes that the employer was willing to voluntarily recognize the UFCW at its new facility in Cobourg, if the union would sign the collective agreement provided to it by the employer in late February, 1996. In *Union Carbide Canada Limited*, [1992] OLRB Rep. May 645, the

Board had before it an application which shared certain characteristics of the instant proceeding. In that case, it was alleged that the responding party had threatened to move part of its operation to a new location not covered by the collective agreement if the applicant and its members did not agree to changes to the collective agreement. When the union did not consent to the changes, the operation moved. Ultimately, the Board did not have to make a determination regarding the unlawful lock-out assertions made by the applicant. However, the Board did make the following observations about the unlawful lock-out allegations made by the union, at para. 10:

With respect to the unfair-labour-practice allegations before the Board, and in particular the “lock-out” charge, it is obvious that the present case does not involve the typical kind of “anti-union animus” that one sees talked about in some of this and other Boards’ previous jurisprudence. This is a sophisticated employer used to dealing with Unions, and whatever operational considerations led it to favour a relocation site in close proximity to its original plant within the Town of Oakville, there obviously were more “risk-free” options available to it, at least from the point of view of the potential application of the collective agreement’s scope clause. In fact, its position was that it was prepared to acknowledge the Union’s *bargaining rights* in any event - provided it could get the accommodations on the terms and conditions of its existing collective agreement that it wanted. That too, of course, can constitute a “lock-out” or other forms of unfair labour practices, albeit in a much more difficult and subtle form. (emphasis in original)

Accordingly, it would appear that, in the appropriate circumstances, conduct in the nature of that involved in this proceeding could constitute an unlawful lock-out.

44. However, here those appropriate circumstances have not been established by the union. From August, 1995 it was evident to all participants that the facility in Peterborough was closing and could not be resurrected in any way, shape or form. The employer could legally move its operation to Cobourg, for valid business reasons, and not be legally obliged to recognize the UFCW at Cobourg, in accordance with the scope of the recognition clause contained in the collective agreement. The union would have no bargaining rights in Cobourg and would be required to organize the employees in order to achieve status as their bargaining agent. The employer determined that it would offer the union voluntary recognition for Cobourg, but on terms and conditions that were preferable (from its perspective) to those contained in the Peterborough collective agreement.

45. There is no doubt that in these circumstances the employer desired to take advantage of the legal consequences of their good faith move to Cobourg. There is nothing prohibiting the employer from doing so, as long as the Act is complied with. Was the employer also intending, by offering this particular draft collective agreement to the union, to modify or alter the behaviour or conduct of those employees who remain in its employ? Although the conclusion is not without doubt, on balance the evidence does not establish such an intention. Mr. Krajaefski acknowledged in his testimony that the union had agreed to wage reductions “and maybe more than that” in various other Ontario bargaining units of Coca-Cola employees that it represents. The draft collective agreement proffered to Mr. Krajaefski appears to be an attempt by the employer to take perhaps unfair (but not unlawful) advantage of the move to Cobourg, and to reap significant rewards in exchange for providing the union with the benefit of voluntary recognition. The evidence does not establish, on balance, that the employer’s intention was to send a message to those employees destined for Cobourg about the benefit of union representation. If anything, the message the employer may have sent to those employees was that it is preferable from a pecuniary standpoint to organize the employer’s new facility without the benefit of voluntary recognition.

46. The potential coincidental termination dates of the proposed collective agreement and the lease in Cobourg are not, in the Board’s view, of any great significance. It was Mr. Sponagle’s testimony that Coca-Cola had, in numerous other leases, negotiated a similar clause so as to provide it with flexibility to end the relationship should it be necessary to do so because of the “business environment”.

Mr. Sponagle also stated that Coca-Cola was happy with the facility and had no plans to depart from Cobourg at the end of three years. It should be recalled here that there is a penalty to departure, that is, the payment of the remaining unamortized cost of any leasehold improvements, though the actual value of same was not disclosed by the evidence.

47. The union asserts that the coincidental dates in the draft collective agreement and the lease for the facility in Cobourg can lead to the inference that the employer was sending a message to its employees destined for Cobourg about the futility of union representation, and accordingly was intended to compel those employees to not exercise their rights under the Act. Such an inference could well be drawn by the Board. It is, however, just as probable an inference to draw that the draft collective agreement was prepared with a view to replicating the three year term previously in effect in Peterborough. Counsel observed during argument that the draft collective agreement was not effective until the date of signing. That is so. However, it was provided to Mr. Krajaefski in late February, 1996, the Cobourg facility was to be up and running by April 1, 1996, and the employer was of the view that the terms of the collective agreement were not negotiable. In these circumstances, it is reasonable to assume that the employer expected the document to become effective sooner rather than later. Accordingly, although it can be argued that the potential termination date of the lease, and the termination date of the collective agreement is more than a coincidence, on balance it is more than likely that the correspondence of the dates is in fact coincidental, as was asserted by Mr. Sponagle in testimony.

48. The final piece of evidence focused upon by counsel for the union to support the theory of an unlawful lock-out was the identity of the 14 employees in Peterborough who would be offered employment in Cobourg. As noted above, six of the ten employees not offered a position had some involvement with the union, either past or present. Only one of the 14 offered employment had had past involvement with the union. This demographic result quite clearly establishes a *prima facie* case of unfair labour practices on the employer's part, and, as noted above, the discharges and corresponding failure to offer employment are the subject of unfair labour practice complaints filed with the Board. There is, however, insufficient evidence before this panel of the Board to allow for the conclusion that the terminations of employment, and the subsequent failure to offer employment to some or all of these ten employees, establish the employer's *motivation* to compel other employees of Coca-Cola, more particularly those offered employment at Cobourg, to refrain from exercising any rights or privileges under the Act, or to agree to provisions or changes in provisions respecting their terms or conditions of employment. The Board notes here that the layoff of the six employees with union involvement may, itself, establish the objective act which constitutes a lock-out for the purposes of the Act, though this was not argued. But it does not, on the evidence before the Board, establish an improper employer motivation in the closing of the Peterborough facility.

49. Ultimately, the employer may not be able to establish, as it is required to do pursuant to s. 96(5) of the Act, that it did not have any anti-union animus in terminating the employment of each of the six individuals, and in not offering one or more of them employment in Cobourg. (That is for another panel of the Board to determine, as the parties agreed at the outset that the lock-out application would proceed in advance of the unfair labour practice complaints). For the purposes of an application under s. 101 of the Act, that is of no assistance to the union, for there is no "lock-out" for the purposes of the Act unless the employer refuses to continue to employ one or more of his employees for a specific stated purpose. The evidence before the Board does not establish that such a motivation was held by the employer.

50. For the reasons set out above, this application is dismissed.

VI. Correspondence

51. By way of letter dated July 8, 1996, counsel for the employer asserted that as this panel is seized of this proceeding, the unfair labour practice complaints ought to be heard by a panel composed,

in part, of this Vice-Chair. For purposes of efficiency that would make some sense. However, as counsel were advised at the hearing, this Vice-Chair is unavailable for any hearing dates until January, 1997. Thus, another panel of the Board would be more appropriate to hear the unfair labour practice complaints, and the proceedings should be scheduled by the Registrar without reference to the composition of this panel.

2603-95-R Canadian Union of Public Employees, Local 79 (“the union” or “CUPE Local 79”), Applicant v. **The Corporation of the City of Toronto** (“the employer” or “the City”), Responding Party

Certification - Evidence - Practice and Procedure - Union winning representation vote but employer asserting that certificate should not issue - Employer submitting that Board mistakenly determined that there was appearance of more than 40% union support and that vote should not have been directed - Board rejecting employer’s argument and affirming its practice under Bill 7 of looking only at information provided by union with its application when determining existence of appearance of 40% support - Board also explaining its inclination, where possible, to count ballots so that “quick votes” under Bill 7 are followed by quick results - Certificate issuing

BEFORE: *R. O. MacDowell*, Chair, and Board Members *J. A. Rundle* and *H. Peacock*.

APPEARANCES: *J. James Nyman* for the applicant; *E. T. McDermott* for the responding party.

DECISION OF R. O. MacDOWELL, CHAIR, AND BOARD MEMBER H. PEACOCK; July 3, 1996

1. To make this decision easier to read, the applicant will be referred to as “CUPE Local 79” or “the union”, and the respondent will be referred to as “the City” or “the employer”. The *Labour Relations Act, 1995* which came into force on November 10, 1995 will be referred to simply as “Bill 7”.
2. This case involves the interpretation of Bill 7, and the way in which the Board has been applying its provisions over the last few months; and in the course of argument, both counsel referred to the statutory language that was in place before the passage of Bill 7. Some of those references are discussed below. However, for comparison purposes, the full statutory provisions governing certification (before and after Bill 7) have also been reproduced in Appendix A, which can be read together with the text of this decision.
3. We will begin by outlining what this case is about, and highlighting some of the issues that it raises. We will then turn to the new statutory language.

WHAT THIS CASE IS ABOUT

4. This is an application for certification in which CUPE Local 79 seeks to represent a large group of City employees who are currently unrepresented. A significant number of those employees have sought membership in the union and have indicated in a secret ballot vote that they want the union to represent them. The question in this case is whether the union is entitled to certification as their bargaining agent - that is, whether the Board can give legal effect to the wishes of employees recorded in the representation vote.

5. The union and the City are no strangers to the collective-bargaining process. CUPE Local 79 already represents some 2800 “white collar” employees in the so-called “inside workers bargaining unit”. CUPE Local 43 (a sister local) represents a bargaining unit of 1800 “blue-collar” workers in the “outside workers bargaining unit”. Employees represented by the two CUPE Locals work in proximity to the unrepresented workers affected by this application.

6. The two CUPE Locals have been involved in collective bargaining with the City for decades. The issue in this case is whether another group of City employees is entitled to participate in that process.

7. The present application relates to a body of employees variously described as “part-time”, “seasonal” or “casual”, who work in the City’s parks, community centres and recreation programs. Their hours of work and work locations vary considerably, as does the actual work that they do. The number of casuals actively employed at any particular time also varies with the season and with the program mix offered by the City.

8. The parties are *agreed* that for the purposes of this certification application the unit of employees appropriate for collective bargaining should be described as follows:

all casual employees employed by the Corporation of the City of Toronto in the Recreation Division of the Department of Parks and Recreation, save and except supervisors, persons above the rank of supervisor, and persons for whom the applicant or any other trade union held bargaining rights as of October 10, 1995.

However, the parties are *not* agreed on the number of employees in this unit for the purposes of the application. In other words, the parties agree on the *description* of the bargaining unit, but they do not agree on its *composition*.

9. The term “casual employee” (or “recreation casual”) is used by the City for payroll purposes to describe these casual workers in a general way, and distinguish them from the “regular” inside or outside workers who are already represented by CUPE. For convenience, we will use the same terminology in this decision. However, it is important to note that the term “casual employee” (as used by the City and applied to a particular individual) does not necessarily connote a continuing employment relationship with the City, either in a common-law contractual sense, or for the purpose of certification under the *Labour Relations Act*. That is one of the issues that divides the parties. Since these “recreation casuals” work intermittently, there is a dispute about just how many of them actually were “employees” at the time the certification application was filed.

10. Counsel for the City advised that, over the course of the year, the City hires as many as 2400-2500 of these “casual workers” who work for various lengths of time in the parks, playgrounds and recreation centres scattered throughout the City. The peak program period is during the summer months when, we were told, the City needs roughly 1500 additional employees to work as lifeguards, supervise wading pools, organize sports activities, administer camp programs, and so on. Many of these individuals are students employed during their school vacation period, so when the summer is over, their jobs end and they go back to school. They may or may not return the following summer.

11. In the fall, the complement of casuals drops considerably. Counsel for the City advised that, for the autumn programs, between 700 and 900 individuals are engaged for activities as diverse as square dancing, piano lessons, or Red Cross certification. In the winter, *yet another group* of workers is engaged in respect of indoor programs or outdoor winter sports activities at the City’s parks, ice rinks and arenas.

12. We were told that only a small group of “recreation casuals” are working continuously - primarily because they have a skill (for example, piano training) that is in constant demand for particular programs or at a particular recreation centre. However that core group comprises only 200-400 workers (the parties disagree about the numbers). The rest of the recreation casuals come and go in accordance with the City’s needs. There is no necessary carry-over between, say, those casuals who act as lifeguards or supervise the wading pools in the summer, and the casuals who clean the ice rinks in the winter. The composition of the casual group is continuously changing.

13. The City says that up to 75% of the summer casuals are hired again in the following summer (the union disputes the percentage). But there is no legal commitment to do so. Nor is there any obligation on the casual to return if asked. In this sense, the casual workers’ situation is quite different from someone with enforceable “recall rights” under a collective agreement.

14. No doubt a number of the summer casuals - especially students - hope to return the following year if they are still available for work and if there is still work available for them to do. No doubt the City is happy to bring back individuals who have performed satisfactorily in the past. But there is no guarantee that casuals will return year after year, or even for the next program cycle. They are engaged as needed; and as we understand it, when their particular assignment ends, they are given documentation (U.I.) that is consistent with a termination of employment.

15. By any measure, there is a substantial turnover of casual employees, since the number and composition of the casual group depends upon the seasons, the program mix that the City chooses to offer, and, of course, their own availability to return to a program that has been offered before. Indeed, it is interesting to note that even the City had difficulty identifying the precise number of casuals who had been employed over the past year. We were told that compiling a list of casuals was difficult because the work locations were geographically diverse and many of the payroll records were kept manually.

16. This application for certification was filed on October 10, 1995 - that is precisely a month before Bill 7 came into effect. The material filed with the application therefore reflects the scheme of the Act that was in effect prior to November 10, 1995. However, because Bill 7 had certain retroactive features, it is agreed that the Board is obliged to apply the new Act to this application, even though it was filed “under the old system”.

17. In support of this application for certification, the union has submitted 738 “membership” cards, and has estimated that, at the time the application was filed, the size of the bargaining unit was 840 persons. We were told that the union had been organizing for a number of months prior to the application, so its estimate is presumably based upon its contact with the various work places and its understanding of the ebb and flow of program activity. The union’s estimate is generally consistent with the City’s own estimate of the number of casuals *actively* working in the fall programs (see paragraph 11 above).

18. In each case, the union card is signed by the individual worker concerned, is witnessed by another person, and indicates that the signer is applying for membership in the union. There is no real challenge to the form of this membership evidence either from the City or from any of the individuals who signed the cards. There is no reason to believe that the cards do not mean what they say: that the person signing the card wants to be represented by the trade union in a collective-bargaining relationship with the City.

19. The City has filed material in response to this application (which, as noted, was launched prior to the passage of Bill 7). The City’s filing identified some 369 persons who were actively at work on Tuesday, October 10, 1995, the day on which the certification application was made.

20. The City has also filed a schedule of some 2455 other persons labelled “recreation casuals” who were not at work on the application date, but who had worked for the City at some point in the previous year. For the overwhelming majority of these individuals, the City has indicated that they were not scheduled to work on the application day, and that their expected date of return or recall was “unknown”. The City’s position is that all of these individuals ($369 + 2045 = 2414$) should be considered to be “employees” “in the bargaining unit” for the purposes of this certification application, *and further that if less than 40% of them have signed union membership cards, there can be no representation vote.*

21. It remains to be determined whether Bill 7 actually requires the kind of *pre-vote* arithmetic calculation proposed by the City, and, if it does, whether such calculation should be based upon the City’s proposed list, material from the union or some revised version of the City’s list that emerges from inquiry or litigation. *The City asserts that an examination of this kind is required before any representation vote can be ordered.* The union’s proposed interpretation of Bill 7 avoids this *pre-vote* exercise altogether - or, more accurately, shifts the focus to one of determining voter eligibility *after* the vote is ordered, rather than whether a vote should be taken at all. We shall have more to say about that later. At this point, it may be helpful to “do the arithmetic” in order to illustrate the dimensions of the problem.

22. For the 369 persons actively at work on October 10, 1995 (i.e. literally “in” the proposed bargaining unit on the application date) the union has submitted 201 membership cards, which represents about 54 per cent of the persons listed by the City as being at work on October 10. For the other 2045 persons not at work on October 10 (and for the most part not scheduled to return to work at any known date) the union has gathered a further 344 cards. Since the union’s card signing campaign took place in the weeks prior to the filing of the application for certification, it appears that by the time the application was filed, quite a number of the casuals who were working during the summer and had signed cards at that time, were no longer actively employed.

23. The union clearly has the support of the majority of the employees actively at work on October 10, 1995, and therefore unequivocally in the bargaining unit on the date the union applied for certification. Since the City says that there are around 900 individuals working in its fall programs, it is also clear that a significant proportion of them want to be represented by the union. However, if the bargaining unit actually contains 2400-2500 “employees” as the City claims, then the union’s level of “card support” in that much larger group is only around 25 per cent of this much larger number. And if the size of the bargaining unit is somewhere between 369 and 3000, it is currently impossible to determine the union’s level of card support in percentage terms, without examining the actual situation of each person named on the employer’s list to see whether such individual should be treated as an “employee” in the bargaining unit for the purposes of the certification process.

24. It is impossible to predict how long such analysis would take - particularly if the “facts” or their characterization are disputed, so that the Board would have to make specific determinations with respect to individual workers. But the union’s estimate of “many months” is not at all unreasonable - especially if the test for inclusion in the bargaining unit for certification purposes ultimately turns on each individual’s personal situation, his/her intention to return to work, or the likelihood that s/he will return to the program, position, or location in which s/he had worked before. This could be a mammoth task, involving hundreds of individual inquiries, and by the time it was completed, the bargaining unit under review would likely have undergone significant change.

25. The nature of the inquiry urged upon us by the employer warrants some further elaboration, because it highlights what might be described as a “systemic concern” in the interpretation of Bill 7. The “process problem” raised by the City in this case is not at all unique. If the employer’s interpretation of Bill 7 is right, quite a number of cases may require such pre-vote litigation to sort out the employee

list. And that, in turn, may significantly impact on the way in which the Board handles certification applications under Bill 7. In other words, while the characteristics of this work group are a little unusual, the legal issue raised by the employer is extremely important for the way in which the certification process works generally - and ultimately whether the new system can actually deliver the 5-day votes which are contemplated by the statute.

* * *

26. We should note that in this particular case, the union could not reasonably have known the precise number of "employees" in the bargaining unit, for, as we have already indicated, even the employer had some difficulty compiling a complete list. The union would have had some general information about the bargaining unit size from its members in the field, from the casuals themselves, and from an earlier application that was filed in the Spring and later withdrawn. But the union would not know the precise number or identity of the employees in the bargaining unit in October, even where, as here, the bargaining unit description was agreed upon. An agreement on the bargaining unit *description* does not mean that there will be agreement on bargaining unit *composition*.

27. However, from an operational point of view (i.e. how the certification process actually works), it is important to recognize that there is nothing unusual about this kind of disagreement or this kind of uncertainty on the union's part. It is a problem that a union faces, to a greater or lesser extent, in every campaign to organize unrepresented workers, and thus will be a factor in quite a number of certification situations. Accordingly, if the accuracy of the union's "estimate" of bargaining unit size is found to be a critical element of the new statutory scheme, then the legal determinations that the Board is called upon to make in this case may have practical (and "tactical") ramifications well beyond its particular facts.

28. In other words, if uncertainty about the "employee list" is a basis for litigation, then there may be quite a lot of it. And if a "list dispute" of this kind can delay the "quick vote" contemplated by Bill 7, then there may be quite a few votes that are delayed - despite the terms of the statute.

29. These ramifications flow from the way in which employees actually go about organizing themselves, and some of the hurdles that they customarily face when they want to exercise their right of self-organization.

30. Prior to the filing of a certification application, a union has no statutory right of access to the employee group at the workplace or on work time. Nor does a union have any access to the employer's records (see sections 13 and 77 of the Act). The union must make its best guess about the composition of the employee complement, based upon employee contact and hearsay. But it will often be wrong. And, if there were no prior agreement on the description of the "appropriate bargaining unit", it would be even more difficult for a union to predict the precise number of employees in the bargaining unit, because the bargaining unit perimeter might itself be the subject of argument (for example: whether to include more than one location, whether full-time and part-time employees should be put in the same bargaining unit, etc.). In the real world of collective bargaining, finding out who all the employees are (and where they are in this case) can be a real challenge for the union, and can pose a practical impediment to employees who want to exercise their right of self-organization (see section 5 of the Act).

31. The present case involves an unusually fluid work group, where it is difficult to pin down the *composition* of the bargaining unit, even though the unit *description* is agreed to. However, the "problem" for the union and its employee-supporters in this case is not as unique as it might first appear. On the contrary. Controversies of this kind are not at all uncommon (especially in the construction industry). They arise from the way in which the union goes about organizing unrepresented

workers, they are fuelled by unavoidable uncertainty and they have historically generated quite a lot of litigation - with all the cost and delay that that entails. Moreover, if such litigation has to happen before a vote is ordered, quite a number of votes will be postponed.

32. Now, of course, to some extent such uncertainty can be mitigated if there are well-known and easily-applied “rules of thumb” to avoid litigation and facilitate the processing of the hundreds of certification applications that the Board receives each year. The Board has had such “rules” for many years, and it remains to be seen how they should or must be modified in light of Bill 7. We will say more about that below. At this point we need only reiterate that the situation raised by this case is not unique, and the interpretation that flows from it may have significant practical ramifications for a broad range of cases, as well as for the Board’s ability to hold the speedy representation votes contemplated by the statute.

* * *

33. On November 21, 1995, the Board, (differently constituted), established a “voting constituency” for this application, based upon the agreed-upon bargaining unit description. The Board also directed that a representation vote be taken, so that the “employees” affected by this application (whatever their number) could indicate, by secret ballot, whether or not they wanted to be represented by the union. In so doing, the Board took into account: the material before it, its reading of what Bill 7 required, and the parties’ agreement with respect to the bargaining unit description. The Board was satisfied that the union’s material demonstrated the requisite “appearance” of support required by section 8 of the Act, so that the union’s right to certification depended on a test of employee wishes.

34. The City disagreed. The City took the position that no vote of employees *could* be taken, that no vote of employees *should* be taken, and further that if a vote were taken, the vote should not be counted and the wishes of employees should not be revealed.

35. The parties did not agree on the composition of the proposed bargaining unit, so they did not agree on the list of eligible voters in the voting constituency. The City maintained that there were 2500-3000 persons who were “employees” in the bargaining unit entitled to participate in the vote, and apparently sent letters to those individuals (or many of them) advising them of the vote and urging them to exercise their franchise. The union’s view was that the votes consisted of the 800 or so employees actually at work in the City’s fall programs when the application was filed.

36. To avoid delay, the union agreed that a vote could be taken using the City’s expanded voters’ list. But the union’s agreement was made without prejudice to its position that the City’s list grossly overstated the number of employees in the bargaining unit and thus the number of eligible voters.

37. The union’s position was that the City’s list contained the names of a large number of persons who were no longer “employees” on the City’s payroll. In the union’s view, the City had “loaded the list” with a huge number of names in order to precipitate “front end” litigation over the list, and derail the quick vote procedure contemplated by Bill 7. The union points out that delaying the vote was in the employer’s interest because in a bargaining unit like this one employee turnover would erode the union’s base of support. And on a more general plane, if a union had to meet a test of correctness with respect to bargaining unit size, it would significantly impede any union’s ability to organize employees.

38. In the union’s view, most of the individuals on the City’s second list were no longer legally connected to the bargaining unit at the time the application for certification was filed. They had left the City’s employ by that time, without either a right or a firm date of “recall/rehire”. Nevertheless, the union was content that the vote go ahead *using the City’s proposed voters’ list*, because the vote would

be taken quickly, and at the very least, some of the employee status/voter eligibility issues might become academic if the disputed individuals had the opportunity to vote and chose not to do so. The vote itself would narrow the issues that had to be litigated.

39. On the union's reading of Bill 7, what was important was not the ultimate accuracy of its "estimate" of the number of employees in the bargaining unit, or the strength of its "appearance" of support based on that estimate. Determining the "appearance" of support was an essentially administrative exercise at the vote-ordering stage (in the sense that it could be done by the Board very quickly, based on the material filed, and without a hearing) - it required the union to assert through its filings, a plausible "showing of employee interest" or claim of support, that would ultimately be tested in a secret ballot vote. Once that administrative hurdle was overcome, the vote could be ordered, and what mattered was who actually *was* in the bargaining unit for voting purposes and the ultimate counting of ballots. Thus, if someone on the employer's expanded list chose not to vote, it *might* not be necessary to litigate his/her status in the bargaining unit or right to vote, because the certification result turns on the views of the majority of those actually voting.

40. On the union's reading of Bill 7, a person who chose not to vote could not be heard to complain about it, and it did not matter whether s/he was or was not an "employee" in the bargaining unit. It was not necessary to conclusively sort out the list before the vote was directed. The vote could go ahead using the City's list, and any challenges could be sorted out later. If a disputed individual turned up to vote, s/he could cast a segregated ballot. If s/he did not turn up to vote, it did not matter whether s/he was an employee in the unit, so that issue need not be the subject of debate. Holding a quick vote (and counting it if the number of segregated ballots would not affect the outcome) would reduce the scope of litigation.

41. There was also the possibility that - as a practical matter and "legalities" aside - one party or the other might be influenced by a definitive expression of employee wishes recorded in a secret ballot vote. That has been the Board's experience both before and since the passage of Bill 7. If the employees vote decisively one way or the other, the parties' appetite to litigate is often greatly diminished; moreover, a quick vote can sometimes have a symbolic effect which "clears the air" and may make it unnecessary to litigate some of the legal issues raised by the institutional parties in their pleadings. Sometimes those parties are content to abide by the wishes of the employees, because that is what makes "labour relations sense" regardless of the "legal" arguments that might be made. And of course, if it is clear that the union would lose the vote even on its view of the facts, it is unnecessary to litigate the parties' differences.

42. The representation vote in the instant case was taken on December 8, 1995. There were four separate polls in various parts of the city, with voting hours extending to 8:00 p.m. so that any individuals interested in the process would have an opportunity to exercise their franchise. Voters were invited to signify by secret ballot whether or not they wished to be represented by the trade union in a collective bargaining relationship with the City.

43. The turnout was quite low - only 342 persons. The union says that this low turnout reflects the casual workers' lack of actual attachment to the workplace, whatever their notional "employment status" might be, and points out that, in any case, everyone had an opportunity to vote, whether or not they chose to do so. We need not comment about that, save to note that the level of voter participation is as irrelevant here as it would be in a civic election or in a vote to elect the benchers of the Law Society of Upper Canada. The outcome does not depend upon a specific level of voter turnout.

44. In the result, a significant majority of the ballots cast in the representation vote were cast in favour of the union. In other words, all of the arguably eligible voters were given an opportunity to cast ballots, the ballots were counted, and the union "won" the vote.

45. The union is content with that result. The City is not.

46. On January 18, 1996 the Board held a hearing to receive the parties' representations with respect to the various issues raised in this case. The City and the union were both represented by counsel who took the Board, step by step, through the provisions of the Act said to be relevant. Both parties referred to sections of the *Labour Relations Act, 1995* (i.e. as amended by Bill 7) that they claimed support their respective positions - although, of course, the parties have a very different view as to what those sections mean.

47. None of the employees (or potential employees) in the bargaining unit affected by this certification application has raised any challenge to the Board's decision to direct that a representation vote be taken to test their wishes. No employee has raised any question about the manner in which the vote was conducted. Nor does any employee or potential employee oppose the union's request that a certificate should issue based upon that representation vote. This case is a contest between the "institutional parties".

THE PARTIES' POSITIONS

48. The City argues that the representation vote should not have been ordered in the first place, because the trade union did not establish, *in advance*, that it represented at least 40 per cent of the employees in what the City *claims* to be the bargaining unit. The City argues that the results of that representation vote must therefore be disregarded.

49. The City argues that the 40 per cent threshold mentioned in section 8 of the Act must be satisfied *before* any vote could be ordered, and must be based upon the employer's evidence and representations on the "proper" employee list and "correct" composition of the employee bargaining unit. In the City's submission, the Board must establish the *actual* number of employees in the bargaining unit, before that threshold count is done; and if that requires a protracted inquiry because of the peculiarities of this work force, that is what the new system under Bill 7 requires. In the City's submission, the Legislature could never have intended that a representation vote could be triggered by a mere *claim* in the union's materials that it enjoyed the requisite 40% level of employee support - even where, as here, it is at least superficially plausible.

50. In the City's submission, the 40 per cent support must be substantiated in evidence not merely claimed or estimated in the union's application; and in the City's proposed unit, the union lacks the necessary level of support. The City asserts that a "percentage" requirement such as the one found in section 8(2) of the Act implies an *objectively fixed denominator*, and such denominator is determined with reference to the number of employees *actually in the bargaining unit* - not the union's estimate, or the number of employees that it claims are in the unit or some "appearance" of support in a "proposed" unit. The City argues that it does not matter that the union "won the vote", because the union and its supporters were not entitled to a representation vote in the first place. Nor does it matter that the union and the employees might have been entitled to a vote on the basis of the law as it was before Bill 7.

51. This last point requires a bit of explanation.

52. As we have already mentioned, this application was filed on October 10, 1995, but was eventually processed in accordance with the retrospective application of Bill 7, when Bill 7 came into force on November 10, 1995. The parties are agreed that it is Bill 7 that applies to this case. However, since both parties addressed argument to the former legal regime and how it was changed by Bill 7, it is interesting to note that if the application had in fact been processed under the "old rules" in effect at the time the application was filed (i.e. the law and practice as it was prior to Bill 7), the Board would have directed a representation vote.

53. It is unnecessary at this stage to go into detail about how the certification process worked prior to Bill 7 - or, indeed, how it worked prior to Bill 40 which made a number of modifications in 1992. It suffices to say that for many years, the Board has had a well-established approach to what was then a largely document-based method for ascertaining employee wishes. Among the Board's "rules of thumb" was the so-called "30-30 rule", whereby an individual who was not actively at work at the time the application was made would nevertheless be treated as being an employee in the bargaining unit if s/he had worked in the 30 days prior to the application and was expected to return to work in the 30 days following the application. (For the Board's rationale for this approach see cases such as: *Sherman Sand and Gravel Ltd.*, [1978] OLRB Rep. May 459 at paragraph 24; *Board of Education for the City of Toronto*, [1983] OLRB Rep. Feb. 273; or *Flo-Con Canada Inc.*, [1989] OLRB Rep. June 594; and see generally Sack & Mitchell, *Ontario Labour Relations Board Practice*, Butterworths, Toronto, 1985, chapter 3). There were also "rules" (more accurately, "approaches" that had emerged from litigation and experience) respecting many of the common problems that arose from the more document-based certification system formerly in place (what to do with "stale" cards, misrepresentation issues, situations where an employee *card* was contradicted by a subsequent statement that the employee had changed his/her mind, etc.); and, it is worth noting that quite often, those "problems" themselves prompted the Board to seek the confirmatory evidence of a representation vote. Again the details are unimportant. The point is: had those "old rules" been applied to this application, the union would have been able to demonstrate about 47 per cent support, and the Board would have directed a representation vote.

54. In other words, it appears that the City's argument would not have been sustainable under the "old system" in effect at the time the application was filed; or to put the matter another way: the City is saying that the vote-based certification process established by Bill 7 may now make it *harder* to get a representation vote than it was before. And, on the City's view of the law, there may be quite a number of situations in which a vote could not happen quickly, let alone within the 5 days set out in Bill 7.

55. We will return to these operational concerns later, because it is clear that the proposed interpretations of Bill 7 raised in this case are intertwined with practical issues concerning the application, administration and overall efficacy of the new statutory scheme.

* * *

56. The union does not read the new statute the way that the City does. The union submits that the Board properly applied the new statute to the circumstances before it, properly focused on the information *in the union's application*, and properly directed that a vote be taken to give every employee an opportunity to signify, by secret ballot, whether or not s/he wished to be represented by Local 79 for collective-bargaining purposes. The statute requires that the union organize an "appropriate bargaining unit", and that is what the union did. In order to get a vote, the statute requires that the union assert and support a showing or "appearance" of significant employee interest, and that is what the union did (as it turned out, among half the employees actually at work on the application date - although the union would not have known the precise number). The statute requires that a union ultimately establish support by winning a representation vote of employees in the bargaining unit; and the union did that too. In the union's submission: it met the so-called 40% "appearance", it won the vote, and it is now entitled to certification under section 10 of the new Act.

57. In the union's submission, the quick vote procedure - now mandatory in every certification case - is a familiar democratic device that employers have demanded for years, and that the Legislature has recently embraced as a means to give employees "the last word" over the certification result. In this regard, compulsory representation votes are part of a Bill 7 package that enhances employee participation in workplace collective bargaining decisions, and includes such devices as compulsory strike votes

before a work stoppage may be called, and compulsory ratification votes before a collective agreement may bind the employees covered by it. In each of these settings the legislation has been modified so that employee wishes determine the result; and in the union's submission, that is the thrust of the new certification provisions as well. The union urges the Board to give effect to the employee wishes recorded in the representation vote taken in this case.

58. In the union's submission, the City's reading of Bill 7 would make it impossible to conduct quick votes in a substantial number of cases, and could therefore not have been the Legislature's intention; moreover, it would open the door to situations, like the present case, where the wishes of the employee voters could be completely disregarded - even though a large number of them want to be represented by the union. The union points out that, on the City's reading of the statute, in order to create delay and avoid the "quick vote" mandated by Bill 7, all an employer has to do is *assert* that the bargaining unit is bigger, or the number of employees is greater, or the identity of the employees is different than the union claims is the case - even if the union's position is "reasonable" as it is here. On the City's theory, such disputes would then have to be resolved before any vote could be ordered - and in this case that could take months. It certainly could not be done quickly even in simple cases, nor is there any statutory disincentive to deter employers (like the "bar threat" applicable to unions - see below) from taking tactical positions of this kind in order to delay the vote. And whether or not there is merit in a particular employer's position, this is the kind of problem which is likely to arise in a large number of cases. Yet the statute contemplates that a 5-day vote will be the norm.

59. In the union's submission, it could not have been the Legislature's intention to make representation votes harder to get than they were before. On the contrary. The whole thrust of the amendments was to shift the focus to employees, and provide a speedy administrative mechanism to canvass employee wishes. The union asserts that if a certification application discloses on its face a plausible claim - an "appearance" - of sufficient support, the Board should direct a representation vote to test employee wishes, and sort out any "employee status issues" as a question of voter eligibility. The vote can be directed on the basis of an administrative assessment of the material accompanying the application; and both the quasi-judicial determinations and their consequences can be postponed until later. The new system shifts the focus to employees and a representation vote: employees are given a device that allows them to "have their say" even though it may later turn out that the certification application is dismissed for one reason or another.

* * *

60. To summarize, then, the main issues raised by the parties are these: did the Board err in this case when it directed a representation vote to test the wishes of employees with respect to trade union representation; and can the Board now certify the union based upon the evidence of employee wishes registered in that representation vote? In order to address those issues, the Board must interpret the new certification provisions created by Bill 7, and decide how the "quick vote" mechanism envisaged by Bill 7 can, and should, be implemented. And, en route to the ultimate result, the Board may also have to address quite a number of practical and legal questions, that are relevant not only in the instant case, but also for the hundreds of other certification applications that come before the Board each year.

61. These are some of the "operational issues" that we mentioned above, and that are highlighted by this case.

62. If the Board concludes that it must analyze the list supplied by the employer in order to make some threshold quasi-judicial determination in advance of ordering the vote, how does it do that within the time prescribed, and without a hearing? What "test" should be applied to determine who is an employee in the bargaining unit for certification purposes? Is the relevant employee grouping confined to those individuals actively at work in the bargaining unit at the time the application is made -

literally “in” the proposed bargaining unit when the union files its application, and around at the time that the workplace vote is to be held? Or should employment in the bargaining unit for certification purposes turn on a broader “test” such as the 30-30 rule, or some even more elastic notion?” How does the Board address the development or application of such “test” if the parties disagree generally or in particular circumstances? If the inquiry embraces persons not actively at work (on layoff, for example), how does (or should) one even notify those persons of the issue concerning them within 5 days, let alone resolve it? How does the Board choose between competing assertions of fact? And how does the Board weigh the alternatives urged upon it in light of administrative efficacy and concrete consequences; for as Reid, J. observed in *Hughes Boat Works*, 79 CLLC ¶14,230:

It must be a matter of real significance to a tribunal whether a possible interpretation leads to practical or impractical consequences in the field of activity it is called on to supervise. I do not suggest that the consequence should be permitted to confute the clear meaning of the statute. Where, however, one of two possible meanings leads to consequences that a tribunal sees in light of its experience and expertise as impractical, I see no reason why the tribunal should not reject it.

63. Finally, when interpreting or applying the new certification mechanism, how does the Board accommodate traditional “labour relations values” and collective bargaining concerns which clearly have *not* been modified by Bill 7? Obviously Bill 7 has changed the way in which employee wishes are tested in certification applications, substituting a compulsory representation vote for the card-counting process that was in place before. However, there is no indication that the Legislature intended to turn back the clock, or abandon values and objectives which have animated the interpretation of the statute for 50 years. Nor should the Board ignore this labour relations perspective.

64. We do not think that the analysis called for in this case can be undertaken in the abstract (with a copy of a dictionary in one hand and *Dreidger on Statutes* in the other). It is important for the Board to keep in mind the real world collective bargaining to which the statute applies and the realities of the administrative process it is designed to regulate. It is also important to remember that the interpretation offered by a party in a particular case is more likely to be shaped by short-term tactical advantage than what is sensible labour-relations policy. Yet the Board has a responsibility to take these broader objectives into account. Thus, when the Board is faced with alternative readings of the statute, it is of real significance whether the options proposed: will facilitate or inhibit employee choice with respect to collective bargaining; will encourage or discourage litigation; will aggravate or moderate adversarial behaviour that can poison the work environment regardless of the outcome of the case; will expedite or retard the resolution of time-sensitive certification questions; will complicate or simplify the regulation process; will increase or decrease the cost to the parties and the public; will minimize or increase the potential for improper employer interference; and so on.

65. The certification process is a critical part of the statutory scheme, and lies at the heart of the Board’s specialized jurisdiction. Accordingly, when implementing the new certification mechanism, the Board must strive for an interpretation that is faithful to both the statutory language and the labour relations context under review.

66. With these observations, then, we turn to the portions of Bill 7 that regulate the certification process. Like the parties in argument, we will begin with a brief overview of the new statute, then review its sections one by one, relating them to each other and to what went before. In our view, the new certification process can be more easily understood when compared with the process that preceded it. The old statutory formula provides some useful interpretive clues when one is analyzing the new statutory language. (This statutory material is reproduced in Appendix A.)

THE CERTIFICATION PROCESS - IN GENERAL

67. The general scheme of the Act is quite simple and, for the most part, was not changed by Bill 7. A trade union can become certified as the exclusive bargaining agent for an “appropriate

bargaining unit” of employees, when a majority of those employees indicate that they want the trade union to represent them. The Act replaces the “recognition strike” with a peaceful method of awarding “bargaining rights” based upon employee wishes. The Board administers that process.

68. The statute guarantees employees the right to join a trade union and organize themselves for collective bargaining purposes. However, employees are not entirely free in this regard. They must organize themselves in groupings that the Board determines to be “appropriate bargaining units” - thereby injecting a public policy component into the determination of bargaining structure (that is, the number and “shape” of the bargaining units in an enterprise). Employees can join a trade union or associate as they wish, but for collective bargaining purposes they are grouped in “appropriate bargaining units”. This limitation on the “shape” of employee self-organization has been part of the statute for many years, but means that there may be some uncertainty on the employees’ part about how they should go about organizing themselves.

69. Once the appropriate bargaining unit is settled, certification depends upon the union’s ability to demonstrate the support of the majority of employees in that unit. Upon establishing majority support, the union is “certified”: it is granted a “licence to bargain” on behalf of the employees in the bargaining unit, with a view to achieving a collective agreement, that (after Bill 7) must then be submitted to employees for ratification. Thus, a union must initially demonstrate majority support in order to become the employees’ bargaining agent, then it must later demonstrate support again for the results of the bargaining exercise. There is an analogous “decertification” process, which can be triggered in a timely way, if the union loses the support of employees (see section 63 of the new Act).

THE CERTIFICATION PROCESS BEFORE BILL 7

70. Prior to Bill 7, most certification applications were decided exclusively on the basis of documentary evidence of membership tendered with the application - that is, cards signed by employees and indicating that they had applied to become union members (much like the cards filed in this case). Under the old system some 80-90% of certificates were granted on the basis of union cards alone. Representation votes were a residual mechanism, that was used only where the union’s card count did not establish a clear majority (i.e. more than 55 per cent), or where there was something in the circumstances of the case that persuaded the Board to seek the additional confirmation of a secret ballot vote. Such circumstances included unreliable or defective documentary evidence, intimidation or misrepresentation in the collection of the union cards, the filing of additional documents from employees (usually in the form of a “petition”) indicating that despite having signed cards they had changed their minds, etc. In the former system these issues often led to expensive and time-consuming litigation, even if the ultimate result was to certify the union based upon its card support alone. The Board’s reports are replete with cases addressing questions of this kind.

71. In most cases, though, certification was a largely administrative process, that involved comparing an employee list and specimen signatures supplied by the employer, with membership cards submitted by the union along with its application. The Board did that comparison, then did a simple arithmetic calculation to determine the result. If the union had more than 55 per cent card support in the “appropriate” bargaining unit, it was “automatically” certified. If it had less than 40 per cent support, the application was dismissed. And if the level of support was somewhere in between 40% and 55%, the Board would order a representation vote. It was a mechanical process that reduced the opportunity for employer interference with employee choice (because the card signing was done in advance, without the employer’s knowledge), and in most cases was relatively quick.

72. However, as we have already mentioned, this document-based system was by no means free of litigation. Not only were there occasional difficulties with the documents themselves, but it was relatively easy to cause some kind of contest about the perimeter of the bargaining unit, the employee

lists, misrepresentation, misunderstanding allegedly improper behaviour, etc., then demand a hearing to establish those assertions. And once that happened, the expedition demanded by the circumstances went right out the window - regardless of the ultimate disposition of the case.

73. The fundamental issue remained the same: do the majority of employees in the bargaining unit want the union to represent them. But the answer to that question was sometimes lost in layers of litigation - including a variety of disputes about defective or contradictory union membership documents and whether those documents reliably indicated "what the employees really wanted". In recent years such cases were becoming increasingly common. That is why one of the features of Bill 40 was designed to restrict the filing of employee "petitions", thereby reducing litigation concerning the "voluntariness" of such documents and whether the employees really had changed their minds about the union. (On the need for expedition in certification matters see: *Nick Masney Hotels* (1970), 70 CLLC ¶14,020 per Laskin, J.A.)

74. This document-based/card-counting system of certification was the norm in Ontario for many years. However, there has always been an active debate in the labour relations community about the reliability of this mechanism, and whether counting cards was the best way to test employee choice. The details of that debate need not be outlined here. (For a good summary of the arguments for and against see: Paul Weiler *Reconcilable Differences, New Directions in Canadian Labour Law*, Carswell 1980, pages 37-49 under the heading "Membership Cards Versus Representation Ballots".) It suffices to say that there are jurisdictions where representation votes are a more prominent feature of the process (Alberta, Nova Scotia, U.S.A.), and it was argued that the Ontario statute should move in the same direction. That is the change that was effected by Bill 7 in November 1995. In Ontario, there is now a "vote in every case" (to borrow the catch-phrase used in the community debate) - which *does not mean*, literally, that there is a vote every time a certification application is filed; but *does mean* that winning a representation vote is the only way that a union can now achieve certification as the employees' bargaining agent. In this regard, Bill 7 is quite different from the old document-based system, which mandated votes only in particular, somewhat limited situations (see the former statutory language reproduced in Appendix A).

75. Under the "old system", the Board was required to make a series of specific determinations, in a specific sequence:

- determine the appropriate bargaining unit (old section 6 in the Appendix)
- ascertain the number of employees in the bargaining unit on the application date (old section 8(1), (2))
- ascertain the number of those employees who were union supporters based upon membership cards to which were applied specific evidentiary rules (old section 8(1)(b) and 8(4) - (7))
- direct a representation vote if the Board was "satisfied" that at least 40 per cent of the employees supported the union (old section 8(2) and 8(3) or if there was some doubt about the reliability of the evidence suggesting over 55% support)
- certify if the union had a clear unequivocal majority (more than 55 per cent on a card basis) or, alternatively, if the union won a representation vote (old section 9(1))

The Board worked through the sequence, step by step, following the pattern prescribed in the statute. In each step the Board was required to make specific quasi-judicial *findings* which produced a prescribed result.

76. However, generally speaking, the old statute itself did not specify the content of pleadings or the kind of information that was to be put before the Board. Nor did the old statute set time limits within which the Board's decisions were to be made. Those matters were generally left to the Board's discretion under its rule-making authority, or were canvassed by the Board in the ordinary course, holding hearings where it was necessary to gather the necessary evidence.

77. An alternative mechanism under the old Act was the so-called "pre-hearing vote process", that was triggered when a union requested that a "pre-hearing vote" be taken (see old section 9 in the Appendix). As its name suggests, the pre-hearing vote procedure was intended to postpone litigation on all issues until after a representation vote was taken.

78. When a pre-hearing vote request was made, the Board had a discretion to determine a "voting constituency" - an employee grouping for vote-taking purposes. The voting constituency was a purely administrative construct for the purpose of balloting. It was not necessarily an "appropriate bargaining unit" - although, of course, the Board tried to make the voting constituency congruent with the possible bargaining unit *alternatives*, in order to make the vote as useful as possible.

79. The Board was then obliged to examine "the records of the trade union and the records of the employer" [old section 9(2)] to see whether there was an *appearance* (not a "finding") of 35 per cent support in the *voting constituency* (not the ultimate bargaining unit). If there was such an "appearance" of 35 per cent support on the basis of the material filed (and there almost always was, because when determining an "appearance" the Board usually adopted the position most generous to the applicant on an "assuming without finding basis") the Board would direct a representation vote (see again old section 9(2)). However, the Board could not give effect to the *results* of that vote until the Board *subsequently* determined what the appropriate bargaining unit was, made a *concrete finding* (as opposed to an "appearance") that the union actually did enjoy the necessary threshold level of support in that unit (not the voting constituency this time), and dealt with any other issues in the case. The employees' wishes did not necessarily control the result (see section 9(4) of the old Act). Indeed, the employees' votes might not even be counted.

80. The pre-hearing vote process was sometimes referred to as a "quick vote" procedure, but, in practice, the vote was not particularly fast - at least by Bill 7 standards. The administrative procedures then in place called for a workplace meeting to examine the records of the union and the records of the employer to settle a voters' list. The vote was then scheduled to take place a number of days after that, so that in practice, the pre-hearing representation vote would not normally take place until 25-31 days after the application was filed. The ultimate result might be further delayed depending upon the length and impact of any subsequent hearings. And because there was a relatively long lead time between the application and the vote, there was an opportunity for employer reaction and employer communications to its employees, which themselves could become the subject of charges and controversy.

81. The pre-hearing vote model postponed litigation until after a vote was taken. But it did little to narrow the issues, discourage challenges, or guarantee a quick result; and for that reason, it was not used very much.

THE SCHEME OF THE ACT UNDER BILL 7

82. Bill 7 was introduced into the Legislature in October 1995 and became law about a month later on November 10, 1995. Much of the Bill was directed to repealing features of "Bill 40". But in addition, Bill 7 made a number of other changes, including a revised certification process.

83. The new scheme no longer permits certification based on membership cards alone (except perhaps in the special circumstances addressed in section 11 - see Appendix). Nor did the Legislature return to the pre-Bill 40 “hybrid model” where a representation vote could be triggered if card signers later filed a voluntary change-of-heart “petition”. Under Bill 7, employees do not have to file a petition with the Board to signify a change of heart about the union or to prompt the Board to direct a representation vote. A representation vote has now become the exclusive method of testing employee wishes (apart from section 11) and is a requirement in every case.

84. However, in opting for “a vote in every case”, the Legislature has not simply reverted to the former process for obtaining and conducting a representation vote. Instead, the Legislature has created an entirely new and quite different mechanism, relying on very quick 5-day votes, to measure the employee wishes, while at the same time limiting the employer’s opportunity to improperly interfere with the employees’ freedom of choice.

85. The secret ballot replaces the signed membership card as the means of testing the employees’ appetite for collective bargaining. But like the previous card-based model, the new system is designed to avoid a protracted “campaign” where the union and employer compete for the loyalties of employees. Because of the tight time frames, there is less opportunity for behaviour that could attract unfair labour practice charges (quite a number of these are filed each year and again see: Weiler: “Membership Cards vs. Representation Votes” mentioned above). The new system makes it very clear that time is of the essence: it is not just “a vote in every case”; the statute contemplates a “*quick* vote in every case”.

86. The 5-day time-frame mentioned in the statute is the most critical characteristic of the new certification scheme. It not only defines the nature of the process, it also requires the Board to develop new administrative structures in order to meet the 5-day target. Indeed, it is a target which we think the Board is required to meet if it can; moreover, it is a target which the Legislature must have intended that the Board *could meet* in most cases, applying the words of the new statutory scheme. The new certification process reflects a legislative trade-off: the elimination of the (relatively) *quick* card counting model for certification, and the substitution of the *quick* vote model instead.

87. There are considerable challenges associated with designing and implementing an “instant vote model” in a large province like Ontario, where hundreds of certification applications are filed with the Board every year. Aside from the logistics of getting returning officers and ballot boxes to appropriate locations around the province, there are quite a number of matters that have to be addressed in the short period leading up to the vote. Among these are the following:

- (i) the application must be delivered to the employer;
- (ii) the employer must receive some time to reply to the application;
- (iii) notice to employees of the application must be given;
- (iv) the Board must decide whether to direct the taking of a vote and under what conditions (e.g. which ballots, if any, should be segregated? If ballots are segregated, should any or all of them be counted?);
- (v) if a vote is directed, the Board must decide on the appropriate voting constituency;
- (vi) a decision directing the vote must issue and be received by the parties;

- (vii) other vote arrangements must be made, including the date of the vote, and the number, location and hours of the polls;
- (viii) notice must be given to employees of the taking of the vote and other vote arrangements;
- (ix) a voters' list should be prepared;
- (x) other issues between the parties, such as the description of the bargaining unit, should be resolved (with the assistance of a Board officer) to facilitate the counting of the ballots.

88. This list is not exhaustive, but is sufficient to illustrate the magnitude of the Board's administrative task. All of these matters have to be accomplished with exceptional and unprecedented speed. What used to be done in 4-6 weeks must now be done in five days.

89. The 5-day time limit defines and colours the whole process. It is a critical element in the new certification mechanism, and an important key to understanding how that mechanism is supposed to work - indeed how it has to work if the time limits are to be met. Some of the things that the Board had to do before simply do *not* have to be done anymore because the new system does not require them; moreover, if the Board has to choose between a reading of the statute that will facilitate 5-day votes in the ordinary course, and one that will not, we think that the Board should opt for the interpretation that gets the job done in five days. That is what the statute contemplates.

90. Bill 7 introduced a number of features designed to streamline the processing of certification applications and avoid litigation. The relevant provisions of Bill 7 read as follows:

7. (8) An application for certification may be withdrawn by the applicant upon such conditions as the Board may determine.

(9) If the trade union withdraws the application before a representation vote is taken, the Board may refuse to consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit until one year or such shorter period as the Board considers appropriate has elapsed after the application is withdrawn.

(10) If the trade union withdraws the application after the representation vote is taken, the Board shall not consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit until one year has elapsed after the application is withdrawn.

(11) The trade union shall deliver a copy of the application for certification to the employer by such time as is required under the rules made by the Board and, if there is no rule, not later than the day on which the application is filed with the Board.

(12) The application for certification shall include a written description of the proposed bargaining unit including an estimate of the number of individuals in the unit.

(13) The application for certification shall be accompanied by a list of the names of the union members in the proposed bargaining unit and evidence of their status as union members, but the trade union shall not give this information to the employer.

(14) If the employer disagrees with the description of the proposed bargaining unit, the employer may give the Board a written description of the bargaining unit that the employer proposes and shall do so within two days (excluding Saturdays, Sundays and holidays) after the day on which the employer receives the application for certification.

8. (1) Upon receiving an application for certification, the Board may determine the voting constituency to be used for a representation vote and in doing so shall take into account,

(a) the description of the proposed bargaining unit included in the application for certification; and

(b) the description, if any, of the bargaining unit that the employer proposes.

(2) If the Board determines that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appear to be members of the union at the time the application was filed, the Board shall direct that a representation vote be taken among the individuals in the voting constituency.

(3) The number of individuals in the proposed bargaining unit who appear to be members of the trade union shall be determined with reference only to the information provided in the application for certification and the accompanying information provided under subsection 7(13).

(4) The Board shall not hold a hearing when making a decision under subsection (1) or (2).

(5) Unless the Board directs otherwise, the representation vote shall be held within five days (excluding Saturdays, Sundays and holidays) after the day on which the application for certification is filed with the Board.

(6) The representation vote shall be by ballots cast in such a manner that individuals expressing their choice cannot be identified with the choice made.

(7) The Board may direct that one or more ballots be segregated and that the ballot box containing the ballots be sealed until such time as the Board directs.

(8) After the representation vote has been taken, the Board may hold a hearing if the Board considers it necessary in order to dispose of the application for certification.

(9) When disposing of an application for certification, the Board shall not consider any challenge to the information provided under subsection 7(13).

• • •

10. (1) The Board shall certify a trade union as the bargaining agent of the employees in a bargaining unit that is determined by the Board to be appropriate for collective bargaining if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

(2) The Board shall not certify the trade union as bargaining agent and shall dismiss the application for certification if 50 per cent or less of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

(3) If the Board dismisses an application for certification under this section, the Board shall not consider another application for certification by the trade union as the bargaining agent of the employees in the bargaining unit until one year has elapsed after the dismissal.

As will be seen, the certification process established by Bill 7 looks quite different from what went before (compare these provisions with sections 6, 8, 9 and 9.1 of the former Act, reproduced in Appendix A).

* * *

91. The quick-vote model established by Bill 7 begins at section 7 of the new Act under the heading "Establishment of Bargaining Rights by Certification". The opening portion of section 7 contains timeliness rules which were not changed by Bill 7 and thus warrant no further comment. Sections 7(8) - 7(10) create a series of "bars" which will be discussed later.

92. The operative provisions of the new certification process start at sections 7(11) - 7(14). Those sections dictate in a quite unprecedented way, precisely how the certification material will be handled and what it must contain. Section 7(11) shifts the onus for serving the application for certification to the union (under the old scheme the Board effected service). Sections 7(12) - 7(14) are designed to codify and simplify the record, so that the Board can act within the 5-day time limit prescribed later on. These pleading and service rules were not in the statute before.

93. Section 7(12) requires an applicant union to provide two specific pieces of information: a written description of the *proposed* bargaining unit; and an *estimate* of the number of individuals in that unit. The statute recognizes that the unit that the union “proposes” may not ultimately be found to be appropriate, and further, that the union may not know the precise number of employees in the unit. At this stage, though, all that is necessary is a “proposed” unit and an “estimate” of the number of individuals in it. This must be accompanied by a list of union members and evidence of their status as such - for example, signed membership cards of the kind that were filed in this case (see new section 7(13)).

94. Section 7(14) contemplates that an employer *may* disagree with the union’s proposed unit description. If it does disagree, the employer has only two days to provide the Board with its own written description of its proposed bargaining unit. No other kind of dispute is envisaged nor representation requested, and the employer must crystallize this kind of dispute very quickly.

95. We must reiterate at this point: section 7 does not mention any other kind of dispute or filing from the employer at this stage. Specifically, section 7 neither requires nor contemplates that an *employer* will file a list of employees in the union’s proposed unit, or in its own proposed bargaining unit. All that the statute mentions is the bargaining unit description, and even that is optional.

96. The employer is not invited to supply specimen signatures or make its own estimate of the number of employees, or challenge the estimate supplied by the union. These were features of the old system and some of the material filed in this case (prior to Bill 7), reflects that history. But this information is not mentioned in new section 7. Nor is there any reference to the “records of the employer” with which the “records of the union” must be compared, as there was under the old section 9(2) pre-hearing vote process. And, by way of comparison, there is nothing like section 63(7) of the new *termination* provisions, which contemplate that *the Board* can seek further information to determine the number of employees in the unit. The new termination provisions contemplate a pre-vote enquiry into the composition of the bargaining unit. The new certification provisions do not.

97. Under the new certification provisions, the employer’s pleading requirements are quite narrow, and the statute does not require the Board to demand more. Moreover, having stipulated these specific procedural/pleading requirements, it seems odd to suggest that the statute prescribes only half of the procedural code.

98. If section 7 tells the parties what information they must put before the Board for certification purposes, section 8 tells the Board what to do with it.

99. Under section 8(1), upon receiving the certification application, the Board is given a discretion to determine a *voting constituency* that will be used for the purposes of a representation vote. In defining that voters’ group, the Board must take into account the bargaining unit description *proposed* by the union in its application for certification, and the description, *if any, proposed* by the employer. The Board is not obliged to adopt either proposal, and in deciding what the voting constituency will be, the Board cannot hold a hearing. In this regard, it is interesting to note that the Board is not merely relieved of any *obligation* to hold a hearing (cf. section 99(3) of the Act); it is positively directed *not* to

do so. New section 8(4) makes it clear that, at this stage, the Board is making decisions based upon the material filed, so that it can get on with the vote quickly.

100. In crafting a *voting constituency*, the Board takes into account the descriptions proposed by the parties, because those proposals can provide useful information about the potential parameters of the appropriate bargaining unit (see new section 9 reproduced in the Appendix). The Board may choose to direct a vote in one or other of the employee groupings (“proposed units”) suggested by the parties, and where, as here, the parties agree on the bargaining unit description, the Board will likely accept that agreement, and the definitions of the voting constituency and the bargaining unit will turn out to be the same. However, when the parties’ proposals differ, the Board may also try to fashion a *voting constituency* that will best accommodate the likely *bargaining unit possibilities*, so that employees’ wishes can be tested in a single vote. For example, if the union proposes a *bargaining unit covering one location* and the employer proposes a *bargaining unit encompassing two locations*, the Board may define the *voting constituency* in terms of the larger grouping, but segregate the ballots from each location for later consideration, depending upon what the appropriate bargaining unit turns out to be. The statute contemplates that the bargaining unit perimeter will not be determined at the outset.

101. In some respects Bill 7 is reminiscent of the old pre-hearing vote process: the Board defines an employee grouping for voting purposes, that may or may not ultimately turn out to be an appropriate bargaining unit. The voting constituency is an administrative device fashioned for the purpose of vote taking. However, unlike old section 9(2), new section 8 does not contemplate that any threshold test of support (be it a “finding” or mere “appearance”) will be made with respect to this *voting constituency*, nor does it refer to some comparison of the records of the union and employer. We shall have more to say about that below.

102. The Board may well want a list of employees in the voting constituency so that it can later make vote arrangements. It may also want information about the employees so that it can fix voting times, print the necessary number of ballots, and so on. But the statute does not mention filings of this kind and the number or list of employees does not enter into the statutory calculus of what the voting constituency will be. Nor at this stage of the process, has any *bargaining unit* necessarily been determined, because (for non-construction bargaining units) that is done under section 9 and may require a hearing of the kind prohibited by section 8(4). At this stage, all that the Board has before it are *proposals* about the bargaining unit contained in the application and response (if any), which it uses to fashion a *voting constituency*, so that it can get on with taking the vote in the 5 days prescribed in the statute.

103. The critical issue dividing the parties in this case, is how to read section 8(2), which we will reproduce again:

(2) If the Board determines that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification *appear* to be members of the union at the time the application was filed, the Board shall direct that a representation vote be taken among the individuals in the voting constituency.

(emphasis added)

104. The syntax of section 8(2) is not a model of clarity, but the comparison or calculation that the Board is required to do before ordering a vote, can be put, schematically, this way:

To direct a
vote

the number of individuals on
vote the union's list of members provided
per section 7(13)

= at least 40%

"the [*number of*] individuals in the
bargaining unit proposed in the
application for certification"
[the exact statutory language]

105. The Board determines an appearance of support on the basis of the material before it, using this formula.

106. The numerator is easy enough. It is determined [(per section 8(3))] by counting the number of names on the "*list of the names of the union members in the proposed bargaining unit*" [the words of section 7(13)] which section 7(13) requires the union to submit. Moreover, it seems that pursuant to section 8(9), none of this *information* can be challenged - which presumably means that the Board must accept *both* the sufficiency and veracity of the membership documents, *and* the other "information" asserted with the application (i.e. that it is a list of names of persons who are union members *in the bargaining unit*). In other words the "information" mentioned in section 8(3) and 7(13), and not subject to challenge under section 8(9), itself includes an aspect of bargaining unit composition. Be that as it may, it seems clear that the numerator is based on the union's claim/pleading and that information cannot be challenged.

107. According to the union, the denominator is equally easy to determine. One needs only look at the "*estimate of the number of individuals in the unit*" [the words of section 7(12) which one finds - and must find - on the face of the certification application form itself. In other words, to find "the number of individuals in the bargaining unit *proposed in the application for certification*" [the section 8(3) words] all one has to do is look at the application to see what actually is "proposed" in it; and if one looks at the application, one will find there "*an estimate of the number of individuals in the unit*" [the section 7(12) words]. It is that number which is used for the purposes of directing a vote under section 8(2).

108. The union submits that the phrase "proposed in the application for certification" refers to both the bargaining unit description and the estimate; and points to the information that the union is required to provide under section 7(12). Counsel for the union asks: why require such information in such similar language if it is not to be used in section 8(2)? And if the employer's estimate were thought to be significant for some reason, why does the statute not ask for it?

109. In the union's submission, what the new system envisages is something a little like (but quite different from) the old pre-hearing vote mechanism. A vote is triggered by an *appearance* of support based upon the union's pleadings and supporting material. The vote is taken within a voting constituency and the ultimate bargaining unit is sorted out later. Those are similarities. But the differences are important. In the new system the employee wishes are more likely to be determinative of their right to engage in collective bargaining because there is no "second check" like old section 9(4), which used to require the Board to go back and recalculate the union's level of card support *after* the bargaining unit was determined and before the vote could be given legal effect. There are no "section 9(4) words", just as there are no "comparing of records words" of the kind found in the former Act.

110. Under the old pre-hearing vote scheme, employees might opt overwhelmingly in favour of union representation, but their votes would not "count" if the union had miscalculated the level of support (i.e. misjudged the bargaining unit perimeter or the number of employees in the unit) or if there

were defects in the documentary evidence submitted to show the “appearance” of support. Under the old scheme a workplace vote could be directed, the employees could register their views and vote overwhelmingly in favour of the union, and those views might be totally disregarded. In what was then a predominately card-based system, card counting (and all the problems that went with it) was a prominent feature, even in the pre-hearing vote option where the employees had an opportunity to register their wishes collectively and unequivocally at the ballot box. IF the union missed the mark on the threshold requirement, it did not matter what the employees voted.

111. In the union’s submission, this consequence is not possible under the new scheme, which elevates employee wishes and voting to a more prominent position; moreover, section 8(9) completely eliminates membership evidence challenges which might have formerly been subject to post-vote litigation. On the union’s theory section 8(9) makes perfect sense because, in the new scheme, it is the ballot not the membership card which ultimately determines the certification outcome. Similarly, the employees’ opportunity to have *their choice* determine the certification outcome is not prejudiced because of *the union’s* lack of information or inability to accurately determine the size of the bargaining unit.

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112. The City proposes a different interpretation. The City says that the 40 per cent threshold requires the Board to determine the *actual number and identity* of the employees in the *bargaining unit*, whose names can then be compared to the list of union members supplied by the union. The *description* of the bargaining unit can perhaps be gleaned from the union’s proposal found on the face of the certification application. But the *bargaining composition* - the number and identity of the persons in the unit - is an independent variable which must be determined separately and objectively, based on all the relevant evidence. The phrase “proposed in the application for certification” in section 8(2) only modifies the words “bargaining unit”. To do the 40 per cent calculation, there has to be an accurate count of employees in the actual unit with which the membership cards can be compared.

113. The City argues that the Board is required to analyze the City’s proposed list of employees, compare it with the union’s information, and sort out any challenges in order to determine whether the union has demonstrated the required level of support in that unit so as to warrant taking a representation vote. In the City’s submission, the 40 per cent hurdle is a mandatory screening device, designed to avoid the disruption of a vote where the union has not first established that it represents a significant core of the workers in the bargaining unit. That hurdle must be overcome before a vote can be ordered. In the City’s submission the Legislature could not have intended that it could be overcome by a mere “pleading” or “claim” of support.

114. On this reading of section 8, the Board in this particular case would have to determine whether the bargaining unit is around 300, or 900, or 3000 employees before doing the calculation which the City says is required, and before holding a vote. Furthermore, if the City is right about how Bill 7 is to be interpreted, the Board would have to do that kind of analysis *whenever* an employer’s assertion of bargaining unit size (perimeter or composition) differed from the union’s “estimate” in any significant way. And for the reasons we have already mentioned, that could be a significant number of cases either because the union’s “estimate” is indeed wrong or arguably wrong, or because the employer says that it is wrong and precipitates a “front end dispute” by filing a different list.

* * *

115. We agree that section 8(2) is part of an overall scheme that includes checks and balances. But we do not read sections 8(2) and 8(3) as the City does. Nor do we think that the City’s reading is the more probable one, having regard to other provisions of the statute and other labour-relations

values - including administrative efficiency. In our view, the union's proposed interpretation is to be preferred because:

- it is more consistent with the words used by section 8;
- it is more in keeping with the *administrative* exercise contemplated by section 8;
- it makes it more likely to achieve the 5-day vote target prescribed in section 8 and,
- it discourages "front end" litigation cost and delay which are undesirable in their own right and which the statute seems designed to minimize.

116. All of these factors point in the same direction.

* * *

117. In our view the words "individuals in the bargaining unit [not *employees* be it noted] proposed in *the application for certification*" in section 8(2) direct the Board's attention to the application for certification filed by the union and the information contained in it - in particular, the union's estimate of "the number of individuals in the unit" required by section 7(12). The application for certification is the source of information for both the number of individuals in the union's proposed unit and the unit description (i.e. the two things that section 7(12) requires the union to specify). An application filed in accordance with section 7 contains all of the information necessary to make the calculations contemplated by section 8. The Board uses that information together with the list and membership documents filed under section 7(13) to verify the *appearance* of support, and direct that a representation vote be taken among the *individuals* in the voting constituency.

118. The whole thrust and focus of the language of section 8(2) is on the union's *application*, to which the words of the section direct the Board's attention. The Board is not directed to look anywhere else, nor do the filings mentioned in sections 7 or 8 require further information on the composition of the bargaining unit. There is an obvious parallel between the words describing the information required in sections 7(12) and 7(13) and the words describing the use to which such information is put in sections 8(2) and 8(3). And section 8(3) itself is quite specific: the determination is made with reference only to the union's application [which contains the union's proposed description and the number of individuals in it, per section 7(12), and the membership material provided under section 7(13)]. Why would section 8(2) require the Board to look somewhere else?

119. We read section 8(2) in this way for a number of reasons, apart from the parallel language of sections 7(12) and 7(13) on the one hand, and sections 8(2) and 8(3) on the other.

120. As we have already noted, Bill 7's section 8 neither requires nor refers to the "records of the employer" as the old pre-hearing vote procedure did (compare old section 9(2)). Unlike old section 9(2), there is no stipulated exercise in which the Board conducts "*an examination of the records of the trade union and the records of the employer*". There is no mention of the "employer's records" at all. Section 7(14) gives the employer an option to respond if it disagrees with the proposed bargaining unit. But, no other response or information from the employer are contemplated.

121. In our view these omissions are deliberate. When considered together with the parallel wording of section 8(2), it suggests that the Board is to examine the information provided by the union in the certification application itself. There is no requirement for an employee list or specimen signatures

as there was under the old system, because of course, it is the vote not the documents which determines the outcome. The fact that the Board may request such lists for the purpose of later making vote arrangements does not make it a statutory - let alone jurisdictional - requirement when deciding what the voting constituency will be or whether to order a vote in the first place.

122. The City's theory requires the Board to know what the bargaining unit is, so that it can establish the base with which the union's card support is compared. But it is only by accident that the Board in this case knows what the unit description will be (i.e. assuming that the Board accepts *the parties'* proposed description, as it usually does). In many cases the Board will *not* know what the unit perimeter is at that stage - that is why it is fashioning and working with voting constituencies. The bargaining unit description is not determined until one gets to section 9, and the ultimate composition of the unit need not be determined until section 10 when the Board has to decide whether "more than 50% of the ballots cast in the representation vote *by employees in the bargaining unit*, are cast in favour of the union". It is under section 10 that the Board has to confront and finalize who is an employee in the bargaining unit.

123. Under section 8 the Board is dealing with voting constituencies, and it seems odd that it might be required to make some early determination of the bargaining unit - especially since at that stage it cannot hold a hearing to do so. Nor is it apparent why the Board should accept the union's proposed unit for calculation of the percentages but not the union's estimate of the number of employees - always bearing in mind that the Board will later have to determine the actual bargaining unit and the actual employee list to confirm voter eligibility and give effect to the results of the vote.

124. The terms of sections 8(4) and 8(5) also point in favour of the union's proposed interpretation.

125. It is perfectly plain that in the ordinary course, the Board is expected to process some hundreds of certification applications each year and to hold a representation vote anywhere in Ontario within five days after the application for certification is filed. For each case it must accomplish the list of tasks mentioned in paragraph 87 above, and finalize vote arrangements within 5 days. Accordingly, any scrutinizing of documents or threshold assessment that the Board is required to make under section 8(2) or 8(3), must be one that can be accomplished almost immediately; moreover, in making those assessments, the Board must not hold a hearing to receive the parties' representations (see new section 8(4)). Given those time constraints and the stipulation that the Board must not hold a hearing, it is not at all surprising that the *appearance* that the Board is required to ascertain, is based solely upon the union's application and supporting material, and is a largely administrative exercise (in the sense described in paragraph 39, above).

126. In other words, the content of the inquiry contemplated by the statute under section 8(2) is constrained and illuminated by all of the provisions of sections 7 to 10, which must be read together to give a sense of how the process is intended to work - indeed, the only way that it can work within the time constraints imposed. The statute simply does not contemplate the kind of inquiry or fact-finding proposed by the City, nor in most cases could it be accomplished within a day or two.

127. The City's proposed interpretation means an end to 5-day votes in a substantial number of cases. The quick vote envisaged by the statute simply could not happen. The City's proposed interpretation also means both prejudicial delay in time-sensitive certification situations and an opportunity for employer interference which the quick vote is designed to limit. And without in any way suggesting that the City has done anything improper in this case, that interpretation means that an employer seeking tactical advantage, can with impunity cause delay by simply causing a list issue. The City's interpretation blunts the remedial thrust of the new vote-based scheme.

128. The formula proposed by the union does the reverse. It works in most cases, and allows the Board to get the job done within the five days mentioned in the statute. It also makes employee wishes and the secret ballot central to the certification process. At the same time, it allows for litigation of legitimate issues after the vote is taken.

129. Section 8(4) suggests that what the Board is engaged in under sections 8(1) and 8(2) is more like an administrative than a “*quasi-judicial*” assessment; and so does the word “appear” in new section 8(2), and the use of the word “estimate” in section 7(12). This form of language suggests an administrative kind of examination of material pleaded or the identification of a plausible claim, rather than an adjudication of fact. The structure of the new process is very different than it was before. The Board is no longer required to make a series of sequential quasi-judicial findings as it was under the former legal regime (see paragraph 75 above).

130. And suppose, as in the present case, there is a difference between the union and the employer concerning the composition of the bargaining unit. How does the Board resolve those disputed facts if it must not hold a hearing, yet, at the same time, must make its determination in a matter of hours? Does the Board simply accept the employer’s submission and decide not to hold a vote - effectively returning to pre-Bill 7 days when litigation over the list and composition of the bargaining unit delayed either a vote or “automatic certification”. That is an undesirable result and seemingly inconsistent with the statutory thrust to have a quick vote; moreover, as the union points out, from a tactical point of view, it would not take employers very long to learn that they could avoid a quick vote by simply manufacturing a dispute about the perimeter or composition of the bargaining unit. That was not uncommon under the old system - particularly in the construction industry - but seems quite out of step with the quick vote model envisaged by Bill 7. And it certainly seems curious that the Board cannot consider challenges to the quality of the union’s membership evidence (new section 8(9)), or perhaps to its list of names of members said to be in the bargaining unit, but must initially and definitively sort out the list of employees with which the membership evidence and list are compared.

131. Sections 8(3) and 8(9), when read together, underline the expedited and administrative quality of the Board assessment mandated by new section 8, which stands in sharp contrast to what the Board was required to do before. That administrative quality is essential to the speed that is now required, and avoids the kind of litigation which used to cause the system to bog down.

132. Under the pre-Bill 7 regime, the Board had to make a number of findings with respect to union membership, based largely upon documentary evidence; and in the Bill 40 period (1992-95) there was a rather precise list of the kinds of evidence that the Board could or could not consider when deciding whether the union had established the requisite support, or whether a representation vote should be ordered. The details do not matter. What is significant is that both before and after Bill 40, these evidentiary disputes were a frequent cause of litigation, because the documents were all the Board had to go on to make the required finding of membership, and thus the documents were the subject of frequent attack. From an employer’s perspective there was an understandable suspicion of documents that it was not allowed to see (section 119 of the Act), and might have been collected in circumstances where peer or other pressures had influenced the employee’s choice. Moreover, from a purely tactical point of view, if the employer could cast doubt on the union’s membership evidence, the Board might order a representation vote: union supporters would then have an additional opportunity to change their minds, and the employer would have an opportunity to communicate with employees and persuade them to forego the collective bargaining option. A vote involved a contest for employee allegiance in which the employer could deploy formidable tools of persuasion and had some real advantages. Under the former model, therefore, there were lots of reasons to attack the documents.

133. Under Bill 7, however, the focus shifts to a representation vote rather than findings based solely on documentary evidence. The vote becomes the final arbiter, and the quality of the membership documents signed some days or weeks before, becomes much less significant. Employee wishes, collectively expressed, become the critical factor for granting certification.

134. Against that background, it is easy to understand why the Legislature provided that when determining the number of individuals from the bargaining unit who “appear” to be union members, an appearance is sufficient, the Board need look only to the information provided in the application for certification; and, pursuant to section 7(13) in disposing of the certification application, the Board does not consider challenges to that information. Bill 7 inhibits litigation over the sufficiency of the membership information because the apparent level of support so disclosed by those documents no longer determines the union’s right to certification. What matters is how many employees cast ballots in favour of the union.

135. Under the new scheme, certification depends upon employee wishes recorded in a representation vote. The quick vote is the central feature of the new process. But by the same token, once the vote becomes the exclusive means of testing employee wishes, we think that it is much less likely that the Legislature intended a lot of “front end litigation” over the right to have such vote taken - let alone a scenario like the present one where the employee wishes might have to be disregarded altogether. We are also reluctant to accept an interpretation that means a Bill 7 vote in this case is more difficult to obtain now than it would have been under Bill 40.

136. Is there an alternative? Could the Board avoid the problem of “front end litigation” and consequent delay, by directing a vote within five days as an administrative matter, but then declining to give effect to it (assuming that a majority of the employees voted in favour of union representation) pending a *subsequent* determination by the Board of *actual* 40 per cent “card support” among the employees ultimately found to be in the unit? Could the Board litigate the threshold test later on? In other words, could the Board treat the new Bill 7 procedures as if they mirrored the former pre-hearing vote process?

137. The problem with this approach is that it has no support in the language of the statute. The decision to order the vote is made on the basis of a *determination* of an *appearance*; and once that determination is made, nothing in the statute contemplates it being revisited. Indeed, the statute says the opposite: the results of the vote will be given effect, (perhaps subject only to unfair labour practice allegations - see section 11). Section 10(1) provides that where the union wins the vote, the union “shall” be certified. The language is mandatory. The union’s certification is, quite explicitly, *not* subject to a second check of its entitlement to the vote in the first place.

138. Had the Legislature intended some *ex post facto* determination of *actual* 40 per cent card support, as opposed to an *appearance* of 40 per cent support, the Legislature could have reproduced language such as section 9(4) of the old pre-hearing vote procedure. However, when one compares the language of the current statute to the language of section 9 of the old Act, it is evident that the Act *used to, could have, but now does not* make a *finding* of *actual* support at any level (as opposed to the appearance of support) a condition precedent to certification. The structure of Bill 7 does not envisage later litigation about, or confirmation of, the section 8(2) decision. Nor, as we have already mentioned, is “front end litigation” practically feasible in 5 days, or seemingly permitted by section 8(4).

139. In our view, neither the statutory time frames nor the statutory language, nor labour relations policy considerations support the kind of inquiry proposed by the City. Nor can the Board simply adopt the City’s proposed number of 3,000 or so “employees” in the bargaining unit, when the union has an equally (if not more) plausible submission that the bargaining unit size is really around 840. In fact, since the Board cannot practically give notice within a couple of days to any employees other than

those actively at work at the time the application is made, there is a good argument - which we need not decide - that it is the group of employees actively at work on the application day that the statute has in mind, and it is that group that is important for bargaining unit determination and voting purposes. The union's estimate of bargaining unit size is quite accurate with respect to that group. But, in any event, we think that the appearance required in section 8 is properly based on the material filed by the union pursuant to section 7.

140. This is not to say that an employer's position on bargaining unit issues is irrelevant when the Board is determining whether a union will be certified. It is not. The Board will still have to sort out the bargaining unit description if it is in dispute, and finalize the bargaining unit composition (i.e. the number and identity of the employees in the bargaining unit, and thus the eligible voters) before it can give effect to the representation vote under section 10 of the Act. The fact that the Board does not have to "revisit" the threshold appearance does not mean that the Board will not have to ultimately sort out the composition of the bargaining unit. But we do not think that it is necessary at the "vote ordering stage", nor is it legally or practically possible given sections 8(4) and 8(5).

141. Counsel for the City asks rhetorically: what if the union has acted in bad faith and has intentionally misrepresented the number of employees in the bargaining unit for the purpose of securing a quick vote to which "it is not really entitled" (i.e. what if the union has manipulated *its* application to *get a vote*, in the same way that the union claims the employer in this case has overstated the bargaining unit size in *its* response in order to *avoid a vote*)? What if the union's purported "estimate" is knowingly false? To be concrete: suppose the union files five cards and says that there are ten individuals in the bargaining unit, knowing that the real number is closer to 100? Could the Legislature have intended that there be a vote in such circumstances?

142. The difficulty with these hypotheticals is that they are exceedingly unlikely, and thus not very helpful as an aid to statutory interpretation. We think that a better guide is how the statute is to be applied in the normal or typical case. That is why we have emphasized that disputes about the description or composition of the bargaining unit are (or were) a normal and relatively common phenomenon, that before Bill 7, frequently led to delay and litigation. Yet it seems clear that in the normal case under Bill 7 the Board is not expected to engage in that kind of exercise (or hold a hearing) at all when deciding whether to hold a vote under new section 8(2). Indeed, as we have explained above, if the Board *were* required to make such inquiries, it would not be able to hold a vote within five days, with the result that votes would not normally be held in five days. The union's interpretation is attractive because it avoids that result: it makes the system work in the typical case.

143. The kind of bad faith scenario hypothesized by the City is certainly not this case or the typical case. In fact, in the Board's experience, trade unions have not knowingly misrepresented their apparent support, either under Bill 7 or under the former pre-hearing vote procedure. Certainly there are instances where the union has been wrong about the perimeter of the bargaining unit or has miscalculated the number of employees in the bargaining unit (for example, in the construction industry where it is easy to miss a work site, or where the bargaining unit consists of part-timers or casuals, etc.). But intentional misrepresentation has not been an actual problem, nor does it seem at all likely that a union would misrepresent its apparent level of support in this way, when the representation vote itself will so quickly reveal the union's *actual level of support*. For the fact is: a union with little actual support in the bargaining unit is likely to lose the vote; and this, in itself, is a potent incentive not to manipulate the system.

144. A union disposed to make mischief in the manner posited by the City can only do so successfully if it actually has majority support among the employees, gleaned from an organizing campaign. Otherwise it will lose the vote. But surely, it is unlikely that a union with actual majority

support would engage in such pretense: that it would file 5 cards and claim the unit was 10, knowing it was 100? Accordingly, whether or not such bad faith behaviour would constitute a “fraud” under section 64 of the Act, the scenario hypothesized by counsel for the City is simply too arcane to be a useful aid to interpretation.

145. There is an additional reason why a trade union is unlikely to manipulate the process in the way hypothesized by the employer.

146. Bill 7 makes a representation vote relatively easy to obtain. But it also creates some serious disincentives for any union disposed to make a frivolous or flimsy certification application. The new “bar provisions” caution potential applicants that they should not embark lightly upon the new certification process, since they face not only the prospect of losing the vote, but also the imposition of a mandatory bar, preventing any new application for a period of a year.

147. Under the former legal regime, the Board had a *discretion* to bar an unsuccessful applicant from making a new application for a period of up to 10 months (see section 111(2)(k) of the Act). In practice, though, the Board did not normally impose a bar unless there were several failed certification applications, or alternatively, the union lost a representation vote. After a vote the Board routinely imposed a 6-month bar, preventing the losing union from filing a new application for certification. In deciding to impose a bar in this way, the Board was balancing the employees’ right to self organization against the need for finality and labour relations stability in the work place.

148. Bill 7 is a little different. Bill 7 not only makes certification depend upon a representation vote in every case, but in addition, Bill 7 substitutes a *mandatory one-year* bar if the union withdraws its application after a representation vote has been taken (new section 7(10)), or if a certification application is dismissed following a counting of the ballots (new section 10(3)). In other words, Bill 7 doubles the post-vote “penalty”; and under new sections 7(8) and 7(9), the Board may also impose new conditions when a trade union seeks to withdraw an application. It may refuse to entertain a new application by the trade union for an elastic period of up to a year. And the discretionary bar/refusal to entertain language in the former statute is still there (see again section 111(2)(k)).

149. The new bar language has not been the subject of consideration by the Board nor, given the view that we take of section 8, is it necessary to do so in this case. It is sufficient to note that while Bill 7 makes representation votes relatively easy to obtain, it also contains terms that should deter both frivolous applications and the kind of intentional manipulation hypothesized by the company.

150. Isn’t there something improper about a union being awarded bargaining rights after a representation vote, when it never actually had sufficient support to entitle it to the vote in the first instance? The practical answer to that is that it doesn’t happen very often and when it does it is mostly by accident, so why should the employees’ entitlement to vote on the issue be lost because of the union’s miscalculation. On a more panoramic level though, the answer we think is simply “no” - not in the context of the present statute and the values that it promotes. The statute now provides enhanced scope for the expression of employee wishes in several areas (strikes, ratifications, certification) and provides the means to give effect to that expression. More than that, the statute makes it clear that the result of a representation vote should govern even where the membership evidence tendered by the union was somehow unsatisfactory (see section 8(9)). In other words, in a quick “vote in every case” regime, ultimate faith is based on the ballot box as the means of testing employee wishes.

151. Given the premise that there is to be a “vote in every case”, there is also something very pragmatic about the scheme of the new Act. Rather than set up an elaborate administrative machinery to assess membership cards and compare them to lists and to signatures provided by the employer, and rather than entertain disputes about entitlement to votes and appropriate voting constituencies, the

statute has prescribed a scheme of incentives and sanctions to regulate behaviour with a view to obtaining a quick test of employee wishes. It is a scheme which (so far at least) has been successful in: expediting the disposition of time-sensitive certification matters; simplifying a once complex process; and minimizing the costs to the parties and the public. While one should not judge the new system by its first few months of operation, the Board's reading of the statute has facilitated quick votes; and that in turn has (so far) been accompanied by fewer unfair labour practice allegations, fewer formal hearings, and an apparent willingness to agree on bargaining unit descriptions and voter eligibility questions which were frequently the subject of litigation under the old system. And, of course, the basic building blocks of the system remain the same: employees must still organize themselves into "appropriate bargaining units" and, as before, a trade union cannot be "certified" as their bargaining agent unless it demonstrates that a majority of the employees in that bargaining unit have signified their desire to be represented - now by means of a vote. These fundamentals of the certification process have not changed.

152. Our final comments concern the Board's inclination, where at all possible, to count the ballots so that the "quick vote" is followed by a quick result. There are several reasons for doing that.

153. It is important to recognize that a vote in the workplace is not a neutral event. Nor is it obvious that a vote taken but not counted is more corrosive to workplace relationships than a vote counted but not given effect because of legal limitations. Common sense suggests that since voting is such a familiar exercise in democratic societies and since it is now a key element in the certification process, it may be quite troubling (or incomprehensible) for the employees who have cast their ballots, if those ballots are not counted - particularly at the urging of a union or employer that for its own reasons does not want the vote results to be disclosed. In what other democratic setting are votes taken but not counted?

154. It appears to the Board that if a vote is taken, employees expect that their ballots will be counted; and unless the number of segregated ballots is so numerous that the vote results will be unhelpful, or the employees' identity cannot be kept secret, there is no reason that the employees' wishes should not be disclosed. Their expectation interest is at least as important to recognize as the tactical concerns of the union or employer. And from a purely practical perspective (which includes cost to the parties and the public) in a significant number of cases, counting the ballots often reduces or eliminates the need for litigation. (See for example: *Knob Hill Farms*, [1995] OLRB Rep. March 303 where costly litigation turned out to be entirely academic because the union ultimately lost the vote. That litigation could have been avoided altogether by simply counting the ballots in the first place.)

155. We might also note that Section 11(3) of the Act suggests that the vote results may be a factor in the certification equation even where it is alleged that there has been such serious illegality, that the vote does not reflect the employees' true wishes. If the vote may be counted in that situation - and the statute certainly contemplates that possibility - there seems little reason not to do so in ordinary cases, merely because a union or an employer might be dismayed by the results, or might have to alter its behaviour in light of a clear expression of employee wishes. Indeed, if collective bargaining is fundamentally about representing a group of employees, it seems curious not to hear what employees themselves have to say about that.

156. Unless there is serious prejudice to the institutional parties, when a representation vote has been taken, the Board is inclined to count the employees' ballots. And that is what it did in this case.

DECISION

157. For the foregoing reasons, we are satisfied that the union in this case has met the requirement in section 8 of the Act to have a representation vote directed based upon the material in its application. In our view, the earlier panel's determination was correct in this regard.

158. The Board is not persuaded that a vote should not have been held, or that a vote should have been postponed until the summer of 1996 when the casual work force would likely be larger. Given the inevitable variability and shifting composition of the casual group, we are satisfied that the fall complement is sufficiently representative to have a timely testing of employee wishes - particularly given the 5-day time frame mentioned in the statute. We also note that Bill 7 itself now supplies the answer if it is suggested that the employee complement as it was in the fall of 1995 was not representative and will change following certification: there cannot be a strike without another employee vote, there cannot be a collective agreement without employee ratification, and if employees are unhappy with the union, they can terminate its bargaining rights in a timely way under new section 63 of the Act which once again involves a representation vote.

159. Having regard to the agreement of the parties, the Board finds in this case that the unit of employees appropriate for collective bargaining is described as follows:

all casual employees employed by the Corporation of the City of Toronto in the Recreation Division of the Department of Parks and Recreation, save and except supervisors, persons above the rank of supervisor, and persons for whom the applicant or any other trade union held bargaining rights as of October 10, 1995.

160. It is unnecessary to decide whether the union's estimate of the number of employees in the bargaining unit (about 840) or the employer's estimate of the number of bargaining unit employees (about 3,000) is the more accurate assessment as of October 10, 1995, the date the application for certification was made. Even assuming that the unit contains the additional employees asserted by the City, the persons within that grouping had the opportunity to vote, and the majority of those voting supported the union.

161. On any scenario, then, the union has met the requirements of sections 8 and 10(1) of the Act, and is entitled to certification based upon the ballot results.

162. To be specific: the Board finds that more than fifty per cent of the ballots cast in the representation vote taken on December 8, 1995 by the employees in the bargaining unit were cast in favour of the trade union.

165. A certificate will therefore issue to the union in respect of the agreed-upon bargaining unit description mentioned above.

DECISION OF BOARD MEMBER JUDITH RUNDLE; July 3, 1996

1. Proper interpretation of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, (Bill 7) requires an appreciation of the context in which Bill 7 was introduced and passed.

2. The election of June 8, 1995 produced a majority government that had campaigned, in part, on a promise to amend the *Labour Relations Act*. The importance of that commitment to the new government may be inferred from the fact that Bill 7 was the first major government bill to be introduced in the 36th Legislature, and the first government initiative to pass and receive Royal Assent.

3. The history of the passage of Bill 7 makes clear three important points concerning the intention of the legislative majority that introduced and passed Bill 7:

1. Bill 7 was intended to correct a perceived imbalance between the treatment of trade unions and the treatment of employers under the old Act.

2. Bill 7 was intended to strengthen the role and decision-making ability of individual workers, whose rights were considered insufficiently protected under the old Act.
3. Bill 7 was intended to make the secret ballot vote the primary mechanism by which trade unions acquire the right to represent employees.

4. In the title of Bill 7 the Legislature declares the new law to be “An Act to restore balance and stability to labour relations ...”. It is essential to note that this restoration of “balance” refers not only to balance *among* trade unions, employers and individual workers, but also to restoring balance *between* trade unions and employers. That two types of “balance” are contemplated is, in my view, deliberate. The historical context supports such an interpretation.

5. Having considered the general context and intent of Bill 7, the Board can turn to the specific issue raised by this case, namely, determination of the threshold for conducting a mandatory representation vote under section 8 of the *Labour Relations Act, 1995*.

6. Two objectives are very clear from the Act. First, the Legislature intended a threshold; the Legislature did not intend a vote in absolutely every case a union applied for certification, but rather, only in cases where the statutory test was satisfied. Second, responsibility for achieving the threshold lies with *individual employees*, not the union.

7. It would have been simple for the Legislature to have made no reference to thresholds, or to have imposed only a token threshold for the application. Subsection 8(2) refers to “40 per cent” and uses the verb “determines” - language which confirms that the Legislature intended the threshold to be *real* and *substantial*, a meaningful hurdle for employees, something requiring a “determination”.

8. Any interpretation of subsection 8(2) that renders the threshold nugatory is inconsistent with the Legislature’s intent and the ensuing language of the statute that there not be a vote in *every* case, but only in each case where the application passes a real and substantial test.

9. Secondly, subsection 8(2) places responsibility for meeting the threshold in the hands of individual workers, not the applicant union. A vote is triggered, not because the union files an application, but only because a sufficient proportion of employees have decided to call for a vote by taking out membership in the union. While it is the union that applies, it is the individual employees who decide - in sufficient numbers - that a vote is required.

10. It appears then that the existence of a critical mass of individual employees would be the prerequisite to a representation vote. Not only do employees have the right to vote on whether a trade union would represent them, they are empowered to choose (by signing cards in sufficient proportion) whether and when a vote takes place. This interpretation is consistent with the Legislature’s intention to make the process “more responsible to individual workers” and “to strengthen the role of the individual workers in the decision-making process”

11. The right to a representation vote belongs not to the union, but, collectively, to a sufficient proportion of employees. It is misleading, as the majority suggests, to talk of the union’s right to a representation vote. Any analysis that assumes the vote is a union entitlement misinterprets the Act and overlooks the fundamental empowerment of individual employees brought about by Bill 7.

12. The majority’s interpretation of the Act fails to pay sufficient deference to the enhanced rights and responsibilities of individual employees under Bill 7. Although the majority’s interpretation assigns to individual employees a greater role than they enjoyed under earlier legislation, it limits

individual employees to a single function - participation in the representation vote - while leaving the “institutional” parties to dominate the remainder of the certification process.

13. Under the scheme of Bill 7, voting is not something that individual employees do once the union and employer have completed a series of prerequisite steps. Rather, voting is a right which individuals acquire when a sufficient proportion among them decides in favour of union membership. Conversely, if the requisite proportion of individual union members is lacking, the individuals do not acquire the right to vote. The absence of the required proportion has two consequences: first, individuals desirous of union representation are unable to vote for it; second, and equally important, individuals opposed to union representation are not required to vote in order to prevent it.

14. Exactly for this reason, the “vote cures all ills” or “ultimate faith is based on the ballot box” approach taken by the majority is inconsistent. Unless a sufficient proportion of individuals decide to trigger a vote by joining the union, then those individuals opposed to union representation need not resort to the ballot box - indeed, they need not do anything - for the status quo to prevail. Where the statutory threshold is not satisfied, forcing opponents to defend the status quo through action at the ballot box means depriving them of their legitimate expectation and placing the onus on *them* to resist union representation when the onus should be on individual union proponents to achieve the statutory threshold.

15. Therefore, numbers *do* count. If the union’s proposed bargaining unit contains either 840 persons or 3000 persons, it makes a difference whether the statutory threshold is 336 or 1200. It makes a difference to the individuals themselves: individual union supporters’ ability to vote for union representation crystallizes at 336 or at 1200. It makes a difference. And individuals opposed to union representation can remain passive - completely inactive - until individual union members number 336 or 1200, when they must manifest their opposition at the ballot box. It makes a difference. Calculating the threshold wrongly (say at 336 when it should be 1200) forces individual opponents of the union to vote when they have a right to see the status quo prevail without them acting. Calculating the threshold wrongly at 336 changes the consequences of their non-action from maintenance of the status quo to potential alteration of the status quo by those who vote.

16. Ordinarily, in a democracy, one is reluctant to sympathize with individuals who fail to exercise the right to vote. However, where the threshold has not been met, individuals are entitled under the Act to expect their workplace to remain unorganized - entitled to expect that no vote or other action by them is required to maintain this outcome. Those who take no part in a representation vote held without satisfaction of the statutory requirement cannot be said to abstain at their peril; they have a right to abstain and expect that nothing will happen.

17. For these reasons, the manner in which the statutory threshold is determined is of critical importance to all workplace parties, especially the individual employees.

18. The relevant provisions of the Act have been set out elsewhere, only subsections 8(2) and (3) are reproduced here:

8. (2) If the Board determines that *40 per cent or more of the individuals in the bargaining unit proposed in the application for certification* appear to be members of the union at the time the application was filed, the Board shall direct that a representation vote be taken among the individuals in the voting constituency.

(3) The *number of individuals in the proposed bargaining unit who appear to be members of the trade union* shall be determined with reference only to the information provided in the application for certification and the accompanying information provided under subsection 7(13).

(emphasis added)

19. It is important to note that the threshold established by the Legislature is expressed, not as an absolute number but rather as a minimum proportion or percentage, or fraction of “the individuals in the bargaining unit proposed in the application for certification”.

20. This percentage or fraction is obtained by dividing “the number of individuals in the proposed bargaining unit who appear to be members of the trade union” by the total number of “the individuals in the bargaining unit proposed in the application for certification”.

21. The Act does not restrict the information used by the Board to calculate the total number of individuals in the proposed bargaining unit. With respect, the opinion expressed in *Burns International Security Services Limited*, (decision dated April 12, 1996, as yet unreported) [now reported in [1996] OLRB Rep. March/April 192], the Board would err if it held that subsection 8(3) fetters its determination in this regard.

22. What subsection 8(3) restricts is the information used by the Board to determine the *number of apparent union members* among individuals in the proposed bargaining unit. It does not affect the determination of the total number of individuals in the proposed bargaining unit. In other words subsection 8(3) speaks to the numerator of the fraction referred to in subsection 8(2), but not the denominator.

23. One can readily understand the reason for restricting the information used to determine the number of apparent union members. By limiting the Board’s consideration to the union’s documents, particularly the cards, the Legislature has prevented employer challenges to the quality of the membership evidence, challenges which in the past have been based on such allegations as defective signatures, coercion, misrepresentation, failure to understand the language, failure to understand the card’s significance, and (prior to Bill 40), non-payment.

24. There is little doubt that Bill 7 contemplates and provides for speedy votes. However, speed is just one of the many principles, not the exclusive and overriding objective that the majority would make it. Indeed, if one was forced to identify the single, dominant principle or objective of the certification process, the political context and the legislative history makes the choice clear: the empowerment of individual employees and the enhancement of their control of the process. An interpretation (namely, that of the majority) that favours speed at all costs over one which is consistent with individuals’ empowerment is not merely incompatible with the Legislature’s intention but is contrary to the language and spirit of the statute.

25. To the extent that speedy votes are desirable, consistent with that desire, subsection 8(2) allows the Board to make a “rough and ready” assessment of whether the union has more than 40 per cent support. However, a rough and ready approach was intended to apply only to the count of apparent trade union members - the numerator in the fraction referred to in subsection 8(2). What the Act does not contemplate is gross imprecision in determining the total number of individuals in the proposed bargaining (the denominator) particularly in a case such as this, where the impact is not merely one or two employees but the difference between 840 and 3000.

26. What information does the Board have available when it comes to count the total number of individuals in the proposed unit? It has not only the union’s description and list, but also any employer’s description. According to subsection 7(12), a unit description *includes* an estimate of the number of employees. The word “includes” was chosen deliberately: it means the numerical estimate is part of, not in addition to the description. The proper interpretation can only be that an employer’s “description” also includes a numerical estimate. If not, the Legislature would explicitly have stated that the employer’s description was different from the union’s.

27. To isolate the union's submissions, as the majority does, is to render subsection 7(14) meaningless - clearly this is not the intent of the statute. While the employer is not obliged to submit a unit description, the 2-day deadline in subsection 7(14) indicates that the Act provides the Board with an opportunity to receive such information prior to making its determination under subsection 8(2). Why? Because such information may - not must, but may - be used by the Board, in its discretion.

28. Consequently, in an application such as this, the Board has two sets of descriptions and two numerical estimates, both relating to the total number of individuals in the unit. Nothing prevents the Board from using all this information to make its determination under subsection 8(2). (As indicated, subsection 8(3) is not a restriction, since it refers only to the number of union members, and not the total number of individuals in the unit.) To the contrary, several reasons compel consideration of all this information:

- (a) excluding relevant information that the employer provides (instead looking only at the trade union's documentation) is inconsistent with the Legislature's intent to restore the balance between trade unions and employers;
- (b) excluding information which shows that the number of employees in the bargaining unit differs significantly from what the union states is inconsistent with the Legislature's intent that the threshold for a vote be real and substantial - not a threshold subject to the vagaries of the union's numerical estimates.
- (c) excluding information which shows that the number of individuals in the bargaining unit differs significantly from what the union states is inconsistent with the Legislature's intent that the threshold belongs to the individual employees and that it be a function of their individual decisions;
- (d) provided that the Board's determination is made quickly and without a hearing (as the Act contemplates), no labour relations purpose is served by basing a determination on only part of the information before the Board.

29. It is important not to blur the distinction between two very different concepts in sections 7 and 8. One is the bargaining unit proposed by the union. The other is the union's description of that proposed unit (including the numerical estimate). The proposed bargaining unit is one thing. How the unit is described or incorrectly described, and counted, or miscounted, is quite another. The distinction is particularly relevant in a case such as this where the parties agreed on the bargaining unit, but not how to describe it or to count the individuals inside.

30. This distinction is useful in interpreting subsection 8(2), which refers only to "the bargaining unit proposed in the application". Subsection 8(2) mentions neither the applicant's description nor its numerical estimate. This strengthens the conclusion that the Board's task - determining how many individuals are in the proposed bargaining unit, albeit in a rough-and-ready manner - is not limited by either party's incorrect description or miscount of the proposed unit. That determination remains the Board's.

31. The majority takes the position that the appropriate calculation involves not the number of individuals in the proposed unit, but actually the union's estimate of that number. It states:

In our view the words "individuals in the bargaining unit [not *employees* be it noted] proposed in *the application for certification*" in section 8(2) direct the Board's attention to the application for certification filed by the union and the information contained in it - in particular, the union's estimate of "the number of individuals in the unit" required by section 7(12).

Had the Legislature intended the Board to be bound by the union's estimate of the number of individuals in the proposed unit, then subsection 8(2) would have made reference to the "estimate". Clearly, it does not.

32. Based on this analysis, it is clear that the statute requires a threshold to be met, namely, those individuals who appear to be members of the trade union must total more than 40 per cent of the number of individuals in the proposed bargaining unit. Only then can the Board order a vote. If the number of individuals who appear to be members of the trade union is less than 40 per cent of the number of individuals in the proposed bargaining unit, then the Board has no jurisdiction to order a vote among the individuals in the proposed bargaining unit.

33. Further, this analysis preserves the statutory (subsection 8(5)) wish that a representation vote be held within the 5-day time period, unless the Board directs otherwise. The Act does not, in my view, at this stage of the certification process, contemplate the Board inquiring into the issue of employee status - hence the use of the word "individual" at this stage of the process. The intent of the statute is to capture the wishes of the "individuals" at a particular point in time (within five days) and preserve those wishes (by sealing the ballot box) pending the resolution of any outstanding issue such as any question of employee status. The Board has shown itself capable of acting in an expeditious manner to resolve complex issues of concern to the parties, such as unfair labour practices. I see no reason why it cannot move in an equally expeditious manner in the certification process.

34. Therefore, applying this analysis to the facts of this case, I would dismiss the application.

“APPENDIX A”**THE CERTIFICATION MODEL****PRE-BILL 40 (1975 - 1992)****“Regular Certification Process”**

7.-(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103(2)(j).

(2) If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board may direct that a representation vote be taken.

(3) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade union, and in other cases, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit.

“Pre-hearing Votes”

9.-(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under subsection 7(2).

THE BILL 40 MODEL**(1992 - 1995)****“Regular Certification Process”**

8.-(1) Upon an application for certification, the Board shall ascertain,

- (a) the number of employees in the bargaining unit on the certification application date; and

- (b) the number of those employees who are members of the trade union on that date or who have applied to become members on or before that date.

(2) The Board shall direct that a representation vote be taken if it is satisfied that at least 40 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

(3) The Board may direct that a representation vote be taken if it is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union on the certification application date or have applied to become members on or before that date.

(4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

1. Evidence that an employee is a member of a trade union, has applied to become a member or has otherwise expressed a desire to be represented by a trade union.
2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.
3. Evidence that an employee who had become or had applied to become a member of a trade union has done anything described in paragraph 2 but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.

(5) The Board shall not consider evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed on or before the certification application date unless it is in writing and signed by each employee concerned.

(6) The Board may consider evidence of a matter described in paragraph 2 or 3 of subsection (4) but only for the purpose of deciding whether to make a direction under subsection (3) and only if the evidence is filed or presented on or before the certification application date and is in writing and signed by each employee concerned.

(7) Subsections (4) and (5) do not prevent the Board from,

- (a) considering whether, on or before the certification application date, section 65, 67 or 71 has been contravened or there has been fraud or misrepresentation;
- (b) requiring that evidence of a matter described in paragraph 2 or 3 of subsection (4) that is filed or presented on or before the certification application date and is in writing and signed by each employee concerned be proven to be a voluntary expression of the wishes of the employee; or
- (c) considering, in relation to evidence of a matter described in paragraph 1, 2 or 3 of subsection (4) that is filed or presented on or before the

certification application date and is in writing and signed by each employee concerned, further evidence identifying or substantiating that evidence.

“Pre-hearing Votes”

9.-(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in the bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a representation vote taken under section 8.

9.1-(1) If a representation vote is taken, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit if more than 50 per cent of the ballots cast are cast in favour of the trade union.

(2) If no representation vote is taken, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit if it is satisfied that more than 55 per cent of the employees are members of the trade union on the certification application date or have applied to become members on or before that date.

THE BILL 7 MODEL

(Effective November 1995)

7. (8) An application for certification may be withdrawn by the applicant upon such conditions as the Board may determine.

(9) If the trade union withdraws the application before a representation vote is taken, the Board may refuse to consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit until one year or such shorter period as the Board considers appropriate has elapsed after the application is withdrawn.

(10) If the trade union withdraws the application after the representation vote is taken, the Board shall not consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit until one year has elapsed after the application is withdrawn.

(11) The trade union shall deliver a copy of the application for certification to the employer by such time as is required under the rules made by the Board and, if there is no rule, not later than the day on which the application is filed with the Board.

(12) The application for certification shall include a written description of the proposed bargaining unit including an estimate of the number of individuals in the unit.

(13) The application for certification shall be accompanied by a list of the names of the union members in the proposed bargaining unit and evidence of their status as union members, but the trade union shall not give this information to the employer.

(14) If the employer disagrees with the description of the proposed bargaining unit, the employer may give the Board a written description of the bargaining unit that the employer proposes and shall do so within two days (excluding Saturdays, Sundays and holidays) after the day on which the employer receives the application for certification.

8. (1) Upon receiving an application for certification, the Board may determine the voting constituency to be used for a representation vote and in doing so shall take into account,

- (a) the description of the proposed bargaining unit included in the application for certification; and
- (b) the description, if any, of the bargaining unit that the employer proposes.

(2) If the Board determines that 40 per cent or more of the individuals in the bargaining unit proposed in the application for certification appear to be members of the union at the time the application was filed, the Board shall direct that a representation vote be taken among the individuals in the voting constituency.

(3) The number of individuals in the proposed bargaining unit who appear to be members of the trade union shall be determined with reference only to the information provided in the application for certification and the accompanying information provided under subsection 7(13).

(4) The Board shall not hold a hearing when making a decision under subsection (1) or (2).

(5) Unless the Board directs otherwise, the representation vote shall be held within five days (excluding Saturdays, Sundays and holidays) after the day on which the application for certification is filed with the Board.

(6) The representation vote shall be by ballots cast in such a manner that individuals expressing their choice cannot be identified with the choice made.

(7) The Board may direct that one or more ballots be segregated and that the ballot box containing the ballots be sealed until such time as the Board directs.

(8) After the representation vote has been taken, the Board may hold a hearing if the Board considers it necessary in order to dispose of the application for certification.

(9) When disposing of an application for certification, the Board shall not consider any challenge to the information provided under subsection 7(13).

9. (1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

(2) Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.

• • •

10. (1) The Board shall certify a trade union as the bargaining agent of the employees in a bargaining unit that is determined by the Board to be appropriate for collective bargaining if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

(2) The Board shall not certify the trade union as bargaining agent and shall dismiss the application for certification if 50 per cent or less of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.

(3) If the Board dismisses an application for certification under this section, the Board shall not consider another application for certification by the trade union as the bargaining agent of the employees in the bargaining unit until one year has elapsed after the dismissal.

[NO "PRE-HEARING VOTE" EQUIVALENT]

11. (1) Upon the application of a trade union, the Board may certify the trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:

1. An employer, employers' organization or person acting on behalf of an employer or employers' organization has contravened the Act.
2. The result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.

3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.
4. The trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board to be appropriate for collective bargaining.

(2) Upon the application of an interested person, the Board may dismiss an application for certification of a trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:

1. A trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions has contravened the Act.
2. The result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.
3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.

(3) The Board may consider the results of a representation vote when making a decision under this section.

(4) Subsections 10(1) and (2) do not apply with respect to a representation vote taken in the circumstances described in this section.

BILL 7 TERMINATION PROCEDURES

(Effective November 1995)

63. (3) The applicant shall deliver a copy of the application to the employer and the trade union by such time as is required under the rules made by the Board and, if there is no rule, not later than the day on which the application is filed with the Board.

(4) The application filed with the Board shall be accompanied by a list of the names of the employees in the bargaining unit who have expressed a wish not to be represented by the trade union and evidence of the wishes of those employees, but the applicant shall not give this information to the employer or trade union.

(5) If the Board determines that 40 per cent or more of the employees in the bargaining unit appear to have expressed a wish not to be represented by the trade union at the time the application was filed, the Board shall direct that a representation vote be taken among the employees in the bargaining unit.

(6) The number of employees in the bargaining unit who appear to have expressed a wish not to be represented by the trade union shall be determined with reference only to the information provided in the application and the accompanying information provided under subsection (4).

(7) The Board may consider such information as it considers appropriate to determine the number of employees in the bargaining unit.

(8) The Board shall not hold a hearing when making a decision under subsection (5).

(9) Unless the Board directs otherwise, the representation vote shall be held within five days (excluding Saturdays, Sundays and holidays) after the day on which the application is filed with the Board.

(10) The representation vote shall be by ballots cast in such a manner that individuals expressing their choice cannot be identified with the choice made.

(11) The Board may direct that one or more ballots be segregated and that the ballot box containing the ballots be sealed until such time as the Board directs.

(12) After the representation vote has been taken, the Board may hold a hearing if the Board considers it necessary in order to dispose of the application.

(13) When disposing of an application, the Board shall not consider any challenge to the information provided under subsection (4).

(14) If on the taking of the representation vote more than 50 per cent of the ballots cast are cast in opposition to the trade union, the Board shall declare that the trade union that was certified or that was or is a party to the collective agreement, as the case may be, no longer represents the employees in the bargaining unit.

(15) The Board shall dismiss the application unless more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in opposition to the trade union.

(16) Despite subsections (5) and (14), the Board may dismiss the application if the Board is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application.

(17) Upon an application under subsection (1) or (2), where the trade union concerned informs the Board that it does not desire to continue to represent the employees in the bargaining unit, the Board may declare that the trade union no longer represents the employees in the bargaining unit.

(18) Upon the Board making a declaration under subsection (14) or (17), any collective agreement in operation between the trade union and the employer that is binding upon the employees in the bargaining unit ceases to operate forthwith.

64. (1) If a trade union has obtained a certificate by fraud, the Board may at any time declare that the trade union no longer represents the employees in the bargaining unit and, upon the making of such a declaration, the trade union is not entitled to claim any rights or privileges flowing from certification and, if it has made a collective agreement binding upon the employees in the bargaining unit, the collective agreement is void.

(2) Subsection 8(9) does not apply with respect to an application for a declaration under subsection (1).

(3) If an applicant has obtained a declaration under section 63 by fraud, the Board may at any time rescind the declaration. If the declaration is rescinded, the trade union is restored as the bargaining agent for the employees in the bargaining unit and any collective agreement that, but for the declaration, would have applied with respect to the employees becomes binding as if the declaration had not been made.

(4) Subsection 63(13) does not apply with respect to an application for the rescission under subsection (3) of a declaration.

1446-95-U; 1448-95-R International Brotherhood of Electrical Workers, Local 804, Applicant v. **Culliton Brothers Limited**, Responding Party v. Group of Employees, Objectors

Certification - Certification Where Act Contravened - Construction Industry - Discharge - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Certification application filed under old Labour Relations Act caught by transition provisions of Bill 7 and determined under new Labour Relations Act, 1995 - Board finding that employer violating the Act in discharging union supporter and in circulating questionnaire inquiring about employees' union membership - Board directing that discharged employee be compensated for lost earnings - Board also certifying union under section 11 of the Act

BEFORE: *D. L. Gee*, Vice-Chair, and Board Members *O. R. McGuire* and *G. McMenemy*.

APPEARANCES: *S.B.D. Wahl* and *T. Keagan* for the applicant; *David C. Daniels* and *Keith Culliton* for the responding party; *Robert Anagnostopoulos* and *Dale F. Fitzpatrick* for the objecting employees.

DECISION OF THE BOARD; July 16, 1996

1. Board File No. 1446-95-U is an application filed on July 11, 1995 under what was then section 91 of the *Labour Relations Act* (the "old Act") in which the International Brotherhood of Electrical Workers, Local 804 ("Local 804" or the "union") sought, among other things, certification pursuant to what was then section 9.2 of the old Act and an order that Gary Kasten be reinstated to his employment with Culliton Brothers Limited ("Culliton") with compensation. Board File No. 1448-95-R is an application for certification also filed by Local 804 on July 11, 1995.

2. On November 10, 1995, during the currency of the hearing of these matters, the *Labour Relations and Employment Statute Law Amendment Act, 1995* was enacted. Pursuant to section 3 of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, with the exception of sections 5, 8, 9 and 9.1 of the old Act, these applications are to be determined as if the *Labour Relations Act, 1995* (the "Act") had been in force at all material times. Accordingly, references to section numbers in this decision will be to the applicable sections of the Act.

3. On July 26, 1995, the first day of hearing, the Board heard a motion by the responding party that the union not be permitted to amend its pleadings to include additional particulars which were filed with the Board and served on the other parties by way of a letter dated July 21, 1995. The objecting

group of employees supported the responding party's motion. Neither the responding party nor the objecting group of employees asserted that they would be prejudiced in any way if the union were allowed to amend its pleading in advance of the commencement of the hearing as it sought to do. Both advised the Board that, if the Board were to permit the amendment, they were prepared to proceed with the hearing. The responding party and objecting group of employees asserted that the Board's Rules of Procedure require all allegations to be set out in the application as initially filed and do not permit subsequent amendment. It was argued that the union should be required to withdraw its application and file a fresh one containing all of the particulars on which it sought to rely.

4. The Board's Rules of Procedure grant the Board the discretion to permit a party to call evidence with respect to a matter not particularized in its initial pleadings (see Rules 20, 22 and 25). In the view of the majority of the panel, this was an appropriate case to do so. The Board, the responding party and the objecting group of employees had a copy of the union's additional particulars five days in advance of the hearing. The responding party and objecting group of employees asserted no prejudice arising out of the late filing of additional particulars and specifically indicated that they were prepared to proceed. The argument advanced by the responding party and objecting group of employees was a technical one which, if accepted, would result in a delay in the proceeding and a waste of the parties' and the Board's resources. Accordingly, the union was permitted to amend its applications to include the additional particulars provided in its letter of July 21, 1995.

5. Numerous challenges to the evidence sought to be called by the union were made throughout the hearing. The union sought to call evidence with respect to a variety of matters which were not pleaded in either its initial application or its letter of July 21, 1995. Again, as the Board has a discretion as to whether it will permit a party to call evidence which has not been properly pleaded or particularized as required by the Board's Rules, each of these matters was dealt with on its own merits. Some of the evidence was permitted. Much of it was not. With the exception of the allegations raised by the union in its letter of July 21, 1995, our determination of this matter was reached almost entirely on basis of evidence which was not challenged by the responding party. Accordingly, no purpose would be served by setting out the numerous challenges made and the Board's rulings and reasons therefor.

6. The union's allegations primarily involve two incidents. The first incident involves the termination of a Culliton employee by the name of Gary Kasten. The union asserts that Mr. Kasten was terminated because he is a member of Local 804. The responding party asserts that Mr. Kasten was terminated for unauthorized use of the project manager's phone. The second incident relied on by the union is the circulation of a questionnaire to Culliton's electrical employees by an employee by the name of Larry Gray. The questionnaire asks, amongst other things, whether the individual is in favour of Culliton's becoming a unionized shop and whether he had signed a union card. The union asserts that Mr. Gray is a managerial employee and that the circulation of the questionnaire amounts to unlawful interference in the employees' right to participate in the union. The responding party asserts that Mr. Gray is not a managerial employee such that his actions are not attributable to management and do not constitute a violation of the Act by Culliton.

7. In support of its request for certification pursuant to section 11 of the Act, the union asserts that, as a result of the termination of Mr. Kasten and the circulation of the questionnaire, the true wishes of the employees in the bargaining unit can no longer be ascertained. It is the responding party's position that, even if it is determined that Mr. Kasten's termination and the circulation of the questionnaire constitute violations of the Act, neither incident would have had any effect on the ability of the employees to express their true wishes. It is asserted that Mr. Kasten's termination could not have affected the employees' ability to express their true wishes as the employees did not know that Mr. Kasten was a union member and therefore would not have associated his termination with his union membership. Concerning the circulation of questionnaire, which took place primarily at a meeting held

on July 17, 1995, the responding party asserts that, according to the union's own version of events, many of the employees had indicated, on July 11, 1995, that they were not interested in joining the union. If they had already determined that they were not interested in joining the union on July 11, 1995, the events of July 17, 1995 could not have influenced them. Finally, the responding party asserts that section 11 is only applicable where the unlawful behaviour occurs during the currency of a union organizing campaign. In the present case, the responding party asserts that there is insufficient evidence of a union organizing campaign being conducted with respect to the employees of Culliton and accordingly, automatic certification cannot be granted.

8. Glenn Diamond, John Williams and Bill Hagerty were called as witnesses by the responding party. Gary Kasten, Martin Rohrmann, Craig Murray and Gary Sheerer were called as witnesses by the union. An agreed statement as to what Brett McKenzie, a witness sought to be called by the union, would testify to, was read to the Board. No evidence was called by the objecting group of employees.

FACTS

9. Based on the evidence heard, we have determined the facts to be as follows.

10. Culliton operates as a residential and industrial, commercial and institutional construction contractor throughout the province of Ontario. The facts material to these applications involve a project awarded to Culliton on June 6, 1995 known as the Manulife Building Project ("Manulife"). The work performed by Culliton on Manulife involved converting a 120,000 square foot, single story concrete block structure from an industrial plant to a commercial office complex. Culliton completely rewired the lighting fixtures and put in computer systems to accommodate the new office complex. Work began on the project on or about June 12, 1995. The substantial completion date was September 15, 1995. Culliton would normally complete a project equivalent in size to Manulife over a span of 12 months. Culliton had three months to complete Manulife. Thus, Culliton was forced to complete the job under extremely tight time constraints. The tradesmen worked a 50 hour work week instead of the usual 40 hour work week.

11. Culliton staffed Manulife in two ways. Seven employees were transferred from other projects which were completed or near completion. The balance of the men were hired through an advertisement which was placed with Canada Manpower. Individuals who contacted Culliton as a result of the Canada Manpower ad were advised to submit a resume. The resume was reviewed following which the individual was contacted for an interview. Some of the interviews were conducted at Culliton's head office by Keith Culliton and/or Bill Hagerty. Some of the interviews were conducted at the job site by Glenn Diamond. Who hired any particular employee depended on who conducted the interview.

12. By the last week in June, 1995, there were 13 to 15 men on the job. By mid-July, there were approximately 16. By the end of July or early August, there were 20 men on the job. By the end of August the number had begun to fall and was approximately 18. By mid-September, there were only 10 men on the job and by mid-October the number was down to five. Throughout June and July, 1995, Culliton had approximately 10 or 11 contracting jobs under way. In response to the certification application, Culliton asserts that there were 30 individuals at work in the bargaining unit on the date of application, July 11, 1995. The union has challenged six of the names and asserts that a seventh, that of Gary Kasten, should be added to the list. Thus, according to the union, there were 25 individuals at work in the bargaining unit on the date of application.

13. Glenn Diamond helped prepare the bid for, and was the foreman or job site superintendent on, the Manulife project. In his capacity as foreman, Mr. Diamond spent approximately 10 percent of his time working with the tools. The remainder of his time was spent performing what can collectively

be referred to as supervisory and administrative tasks. Mr. Diamond spent an unusually high amount of time on such tasks due to the time constraints within which the job had to be completed. It is not disputed that Mr. Diamond was employed in a managerial capacity while working on the Manulife project.

14. Bill Hagerty has been employed by Culliton for approximately 23 years. He is the senior electrical estimator. Mr. Hagerty was the office to job site co-ordinator for the Manulife project.

15. John Williams has worked for Culliton for approximately 27 years and has been the Electrical Division Manager since 1981. Mr. Williams' responsibilities include determining where the electrical employees work and supervising the office estimating group. Mr. Diamond was required to report all employee performance issues on Manulife to Mr. Williams.

16. Neil Gunther has been employed by Culliton for 10 years. He was the lead hand on Manulife.

Gary Kasten's Termination

17. On June 7, 1995, Gary Kasten, an unemployed journeyman electrician, saw Culliton's ad at the Canada Manpower office. Mr. Kasten phoned Culliton's Stratford office and spoke to Keith Culliton. At Mr. Culliton's request, Mr. Kasten faxed Mr. Culliton a copy of his resume. Mr. Kasten's resume does not set out the names of the contractors he has worked for. Following receipt of Mr. Kasten's resume, Mr. Culliton called Mr. Kasten back and arranged for Mr. Kasten to attend an interview with Mr. Diamond on June 8, 1995 at the Manulife job site.

18. On June 8, 1995, Mr. Kasten attended at the Manulife job site for his interview wearing a hard hat bearing a "Nicholls-Radtke Limited" logo. Nicholls-Radtke Limited ("Nicholls-Radtke") is a well-known unionized electrical contractor. Mr. Diamond noticed the hard hat and asked Mr. Kasten if he had worked for Nicholls-Radtke. Mr. Kasten responded that he had and that he was a member of Local 804. Mr. Kasten indicated that he just wanted to work and was not there to cause any problems. After some discussion concerning the nature of Mr. Kasten's job experience, Mr. Diamond gave him a job application and employee handbook and asked him if he could start work on June 12, 1995.

19. On June 9, 1995, Mr. Diamond mentioned to Mr. Hagerty that Mr. Kasten would be starting work on June 12, 1995. Mr. Diamond mentioned that Mr. Kasten was a member of the union and referred to his hard hat as a "union hat". When, later that same day, Messrs. Hagerty and Williams were making up the list of job assignments for the following week, Mr. Hagerty informed Mr. Williams that Mr. Kasten was a union member.

20. Mr. Kasten commenced work on June 12, 1995 wearing his Nicholls-Radtke hard hat. He returned his completed job application form to Mr. Diamond. Mr. Kasten failed to provide his health card number as he had lost his card and had not yet obtained a replacement. By memo dated July 27, 1995, Mr. Kasten was advised to provide Heather in personnel/payroll with his health card number as soon as possible.

21. Mr. Kasten worked from June 12 to June 26 without incident. Mr. Diamond experienced no problems with Mr. Kasten. Mr. Kasten performed his job in an acceptable manner.

22. On June 16, Mr. Diamond interviewed and hired another individual by the name of Steve Brown. Mr. Brown commenced work on June 19, 1995. On June 21, 1995, Mr. Diamond noticed that Mr. Brown carried a Pepsi bottle with him everywhere he went which caused Mr. Diamond to suspect that Mr. Brown was drinking alcohol at work. In Mr. Diamond's view, an electrician drinking on the

job is a very serious matter. Initially, the only sign Mr. Diamond could discern that supported his suspicion that Mr. Brown was drinking, was the fact that Mr. Brown was perspiring excessively. However, on June 26, 1995, Mr. Brown began working with a knockout punch and Mr. Diamond noticed that he was mixing up parts. On June 27, 1995, Mr. Brown started to assemble junction boxes on the ceiling which required Mr. Brown to climb ladders.

23. On June 26, 1995 at 12:20 p.m., Mr. Diamond was in his trailer having lunch when an individual identified only as "Fred", the site superintendent employed by Walter Fedy, the project manager, knocked on the door. Fred informed Mr. Diamond that they had a "serious problem"; an employee of Culliton who matched Mr. Kasten's description had used the Walter Fedy phone five or six times that day. Mr. Diamond thought of Mr. Kasten's truck which bore a "Mr. Fix-It" logo and immediately assumed that Mr. Kasten was using the phone to line up personal work. Mr. Diamond advised Fred that he would look into it. Fred said "leave it with me now and I will monitor the situation". At approximately 3:30 p.m. that same day, Mr. Diamond and Fred were out on the job site at which time Fred positively identified Mr. Kasten as the employee who had been using the phone.

24. On June 27, 1995, at approximately 11:00 a.m. Fred told Mr. Diamond, "your buddy has used my phone again". Mr. Diamond told Fred he would look into the matter. Mr. Diamond phoned the shop to speak to Mr. Williams. He was told that Mr. Williams was out until after lunch. Mr. Diamond said he would call back.

25. Mr. Diamond called Mr. Williams back at 1:45 or 2:00 p.m. He told Mr. Williams about Mr. Kasten using the Walter Fedy phone and his suspicions that he was arranging work for himself. Mr. Diamond also told Mr. Williams about his concerns about Mr. Brown drinking on the job. Mr. Williams told Mr. Diamond to leave it with him and that he would get back to him later in the day. Mr. Williams was aware that Mr. Kasten was the employee who he had earlier been informed by Mr. Hagerty was a member of the union.

26. At approximately 2:45 p.m. Brett McKenzie, an organizer for the International Brotherhood of Electrical Workers Construction Council of Ontario, and Michael Wall, an organizer for the Sheet Metal Workers International Association, attended at the Manulife job site. Mr. McKenzie spoke to an electrician and an apprentice and then introduced himself to Mr. Diamond as a representative of the IBEW. Mr. Diamond told Mr. McKenzie not to disturb the men until the end of the day. Mr. McKenzie proceeded to wander around the job site. At approximately 3:30 p.m., Mr. Diamond mentioned the presence of the union representatives to Fred. Fred indicated that they did not have permission to be on the job site and went to look after it. Shortly thereafter the union representatives were removed from the job site.

27. At 3:45 p.m. Fred approached Mr. Williams again and told him that Mr. Kasten had once again used the Walter Fedy phone.

28. At approximately 4:00 p.m. Mr. Diamond again phoned Mr. Williams. He called Mr. Williams as opposed to waiting for Mr. Williams to call him back as promised because "that was the third time Fred had mentioned the problem of the phone calls in a day and a half and [he] was getting sick of it and wanted to know what to do". Mr. Diamond mentioned the fact that the union representatives had been on the job site and asked if Mr. Williams had determined how to handle the problems with Messrs. Kasten and Brown.

29. Shortly after the 4:00 p.m. phone conversation, Mr. Williams called Mr. Diamond back and informed him that both Messrs. Kasten and Brown were to be informed at the end of the day that "we have no more work for you". At the time of making this decision, Culliton still had an ad placed with Canada Manpower to hire additional help for the Manulife project.

30. Mr. Diamond, accompanied by Mr. Gunther, met with Mr. Brown at 5:15 p.m. and informed him that "we have no more work for you". At 5:20 p.m., Mr. Diamond, again accompanied by Mr. Gunther, conveyed the same message to Mr. Kasten.

31. It is not disputed that Mr. Kasten did in fact use the Walter Fedy phone. Mr. Kasten used the phone in an effort to contact OHIP and arrange for a replacement health card and to contact his lawyer. Mr. Kasten chose to use the Walter Fedy phone because it is located much closer to the job site than the Culliton phone. Notwithstanding that there were always people about when Mr. Kasten was using the phone he was never told that it was not acceptable for him to do so. Mr. Kasten never sought permission to use the phone.

32. It is clear that the Nicholls-Radtke logo on Mr. Kasten's hard hat indicated to Messrs. Hagerty, Williams and Diamond that he was a member of the union. In the course of giving their testimony, they would often refer to Mr. Kasten as "the Nicholls-Radtke employee" as a short form for referring to Mr. Kasten as the employee who was a member of the union. As indicated above, Mr. Hagerty testified that Mr. Diamond, in reference to Mr. Kasten's Nicholls-Radtke hard hat, indicated that Mr. Kasten was wearing a "union hat". Mr. Diamond did not dispute the proposition that it would have been obvious to people on the job that Mr. Kasten was a union member as a result of the logo on his hard hat.

33. Following Mr. Kasten's discharge, Local 804 filed an application for interim relief (Board File No. 1447-95-M) seeking Mr. Kasten's reinstatement pending the disposition of Board File No. 1446-95-U. Prior to the commencement of a hearing to determine if Mr. Kasten was to be reinstated on an interim basis, Culliton agreed to reinstate Mr. Kasten pending the outcome of the Board's determination of whether he had been unlawfully terminated. Mr. Kasten returned to work on July 14, 1995. During the period of June 28, 1995 to July 14, 1995, as a result of a union referral, Mr. Kasten was employed elsewhere for all but three days.

Circulation of the Questionnaires

34. On Saturday, July 15, 1995, Mr. Diamond, Mr. Gunther and an electrician by the name of Gary Sheerer were working at Manulife. They finished work at approximately 12:00 noon. As they were walking to their cars they met up with an employee of Culliton by the name of Larry Gray. Mr. Gray was employed at the time as a foreman on a project known as the Corunna Pumping Station ("Corunna").

35. Mr. Gray had a questionnaire with him which he indicated he wanted to get the employees of Culliton employed on the Manulife project to fill in. The questionnaire reads as follows:

July ____/95

I _____ am not in favour of Culliton Brothers Limited
(name)
Electrical Division becoming a unionized shop.

I _____ seen a union representative recently.
(have) (have not)

I _____ sign a union card
(did) (did not)
because _____

I _____ received any communication or pressure
(have) (have not)
from the company one way or the other on this issue.

print name

address home

present job site

phone home

signature

36. Messrs. Sheerer, Gray, Diamond and Gunther stepped inside the trailer where it was air-conditioned. Mr. Gray handed out the questionnaire and read the questions aloud. He asked the others to fill out the questionnaire and return it to him. Discussion took place concerning how Mr. Gray could arrange to speak to the remaining employees working on the Manulife project. Mr. Diamond indicated that any meeting would have to take place after working hours and off of the job site. Mr. Diamond did not want the meeting to affect the work schedule. He had also heard years ago that such meetings should not take place during working hours or on the job site. It was decided a meeting would be held after hours on Monday, July 17, 1995 in a nearby parking lot. There was then discussion as to how the employees were to be informed of the meeting. It was decided that Mr. Diamond should not be involved in any way but rather Mr. Gunther would advise the employees of the meeting. Mr. Gunther is with the employees at the start of the day, at breaks and at lunch and accordingly he would have the opportunity to speak to the employees about the meeting.

37. On July 17, 1995 during the afternoon break, Mr. Gunther announced to the employees that there would be a meeting with a senior Culliton employee after work in the parking lot. Approximately 12 people attended the meeting. Mr. Gray advised the employees that he had retained a lawyer to represent the employees of Culliton to oppose Culliton going union. He asked the employees to fill in the questionnaire. Mr. Gray had attended at the homes of some of the employees and asked them to sign the questionnaire over the weekend. The questionnaire was thus only given to those employees who had not already completed it.

38. As indicated above, Mr. Gray has been employed by Culliton for 22 years. He is the third most senior Culliton employee and the most senior electrical field employee.

39. As of July 17, 1995, Mr. Gray was employed by Culliton as a foreman on the Corunna project. Mr. Gray worked on the Corunna project from August, 1994 through to July, 1995. The Corunna project involved a considerable amount of high voltage wiring, an area in which Mr. Gray had previous experience. Mr. Gray performs approximately 60 percent of Culliton's high voltage work.

40. Mr. Gray shares a desk at Culliton's office with other foremen who have paperwork to do.

41. Mr. Gray provides advice and guidance to Mr. Hagerty when Mr. Hagerty estimates high voltage jobs. Mr. Gray advises Mr. Hagerty as to how the work would be performed and how he would organize the work. Mr. Gray advises Mr. Hagerty on the site conditions and how such conditions may affect performance of the work based on his past experience working on high voltage projects. Mr. Gray also assists with the preparation of bids by doing the take-offs.

42. Mr. Gray spends some portion of his time in the office doing take-offs from drawings and assisting with estimates. Although the evidence does not establish the percentage of time Mr. Gray spends in the office, he has been seen working in the office by employees who attend at the shop to pick up supplies or enquire about upcoming work opportunities. On these occasions, Mr. Gray has been

sitting at a desk outside of Mr. Hagerty's office doing take-offs from drawings and working on blueprints.

43. The responsibilities of a foreman include completing a time card on behalf of each member of the crew. The foreman fills in the number of hours worked and a cost code indicating the type of work performed and initials the card. Foremen report any problems they have with employees to John Williams. They do not have the authority to discipline employees. Where an employee needs time off work and the job is outside of Stratford, the employee will speak to the foreman. Where the job is in Stratford, the employee will contact the Culliton office. Where emergency overtime work is necessary, the foreman will contact the office to discuss it. If the office is not available, the foreman will make the decision on his own. When Saturday overtime is required, the foreman will contact the office to discuss whether the overtime is necessary. The foreman will decide who will work the overtime as the foreman knows who has been working on each section and who can most expeditiously perform the work. Foremen are responsible for examining the blueprints, distributing work amongst the crew, and ensuring installations are done in good, workman-like manner. Foremen can order standard materials from the office and would speak to Mr. Williams concerning a need for personnel. Foremen are responsible for advising employees with respect to safe work practices and any potential or actual dangers on the job. A foreman is never appointed as the employee health and safety representative on a job. On a typical project, a foreman would spend between 70 and 75 percent of his time working with the tools. The office to job site co-ordinator (either Mr. Williams or Mr. Hagerty) would attend at the job site once every two weeks.

Organizing Campaign

44. In November, 1994, Mr. McKenzie attended at a Culliton job known as the Brantford Sewage Treatment Plant where he met Mr. Diamond.

45. In March, 1995, Mr. McKenzie was contacted by an electrical employee of Culliton by the name of Craig Murray who expressed an interest in the union. At the time of the contact, Mr. Murray was attending trade school at Conestoga College. Mr. McKenzie asked Mr. Murray to contact him once he was back at work. Mr. Murray contacted Mr. McKenzie for a second time in April, 1995. Mr. McKenzie advised Mr. Murray that he was busy with problems involving another local and asked Mr. Murray to provide him with a list of Culliton's jobs and electrical employees and some insight into the employees to contact. Mr. Murray provided Mr. McKenzie with some information and advised him that he was working on the St. Joseph Hospital job and that it was a sixth floor renovation.

46. On or about June 1, 1995, Mr. McKenzie attended at the St. Joseph Hospital job and spoke with three Culliton employees. In the course of his conversation with the third employee, Mr. McKenzie was approached by the foreman. Mr. McKenzie explained who he was and was told to leave by the foreman. In the course of his conversation with the employees, Mr. McKenzie was informed of a job at the Simcoe Hospital and the LCBO in Stratford. Shortly, thereafter, Mr. McKenzie was informed by Tom Keagan, a representative of the IBEW, that Culliton had been awarded the Manulife job. Mr. Keagan had been informed of the size and timetable for the Manulife job by a union contractor that had bid on the job. Mr. Keagan was aware that Culliton would have to hire a number of electricians if they wanted to bring the job in on time.

47. Approximately one week later, Mr. Keagan spoke with Mr. McKenzie and informed him that he had received a call from Mr. Kasten who had informed him that he had obtained a job with Culliton on the Manulife job. Mr. Keagan also informed Mr. McKenzie that there was a listing at Canada Manpower indicating that Culliton was hiring electricians. Mr. McKenzie then contacted members of the union and asked them to respond to the Canada Manpower ad in an attempt to secure work with Culliton. These individuals' membership would be used in an attempt to certify Culliton and

they would supply information to the union. They were not asked to attempt to sign up other Culliton employees. Three such individuals were successful in obtaining employment with Culliton. They were: Steve Lusk, Gary Sheerer and Tony Moser. Messrs. Murray and Rohrmann, although not referred to Culliton by the union, had signed cards and were likewise asked to provide information to the union. Although not, strictly speaking, accurate with respect to Messrs. Murray and Rohrmann, all five of these five individuals were referred to during the proceedings as "salts".

48. Mr. McKenzie also contacted Mr. Kasten. Mr. Kasten confirmed that he was working for Culliton at Manulife. He explained that he had got the job on his own and that Mr. Diamond had noted that he was a union member. Mr. Kasten indicated that he told Mr. Diamond that he was not there to organize, he just wanted a job. Mr. McKenzie told Mr. Kasten that that was fine, he should keep his head down and not give them any excuse to fire him.

49. Prior to June 27, 1995, Mr. McKenzie had contacted six electrical employees of Culliton, not including the salts or Mr. Kasten, who indicated an interest in speaking to him.

50. As indicated above, on June 27, 1995, Mr. McKenzie attended at the Manulife job site with Mr. Wall from the Sheet Metal Workers International Association at approximately 2:45 p.m. Mr. McKenzie spoke to two Culliton electrical employees for a period of time, moved on and then encountered Mr. Diamond. Mr. McKenzie introduced himself to Mr. Diamond as an organizer for the IBEW and asked if he remembered him from the Brantford Sewage Treatment job. Messrs. McKenzie and Diamond had a discussion about the job and the tight time table. Mr. Diamond emphasized to Mr. McKenzie that he not talk to the employees as there could be no delay in the work. Mr. McKenzie continued to walk around and observe the job and the individuals working on it. At approximately 3:45 p.m., Messrs. McKenzie and Wall were approached by Fred and asked to leave the site.

51. On June 27, 1995, Mr. Kasten was terminated.

52. On July 10 and 11, 1995, Mr. McKenzie attended at four separate Culliton job sites where he spoke to a number of employees. Over the same two days, Mr. McKenzie also attempted to contact a number of employees by telephone. In total, Mr. McKenzie attempted to contact 20 employees. He spoke with 17. Five of the 17 contacted were the salts. They continued to support the union. Five of the six electrical employees who Mr. McKenzie had previously spoken to and had expressed an interest in speaking to him were contacted. One was reached while working on a job site and informed Mr. McKenzie that he could not be seen talking to him. A second individual contacted responded that Culliton was a non-union company and that they had already gotten rid of one union guy. The remaining three flatly indicated that they were not interested in talking to Mr. McKenzie. The remaining seven individuals contacted had not been previously contacted by Mr. McKenzie. They would not speak to him.

53. Three additional salts were subsequently hired by Culliton, one on July 17 and two in August.

DECISION

54. Having regard to the foregoing facts, it is our determination that Mr. Kasten's termination was motivated at least in part by the fact that he is a member of the union and was thus a violation of the Act. It is our further determination that Mr. Diamond's sanctioning of the circulation of the questionnaire and participation in discussions concerning its circulation constitutes a violation of the Act. We have also determined that Mr. Gray is a managerial employee. As such, his circulation and collection of the questionnaire amounts to interference with the employees' right to participate in the lawful activities of a trade union and is thus a violation of the Act attributable to Culliton. As a result of

the foregoing violations of the Act, it is our determination that the employees would be unable to express their true wishes in a representation vote and that there is no remedy which would counter the effects of the violations. Finally, it is our finding that the trade union has membership support adequate for the purposes of collective bargaining. Accordingly, it is our determination that the union is to be certified pursuant to section 11 of the new Act. Our reasons follow.

Gary Kasten's Termination

55. The decision to terminate Mr. Kasten was made by Mr. Williams. According to Mr. Williams, he decided to terminate Mr. Kasten, as opposed to simply telling Mr. Kasten to cease using the phone or inquiring as to why he was using the phone, because he wanted to handle the problem quickly and keep the job moving. In our view, this explanation is simply not probable in all of the circumstances.

56. As indicated above, Culliton was under extreme pressure to substantially complete the Manulife job, a job which would normally take a period of 12 months, in only three. The severe time constraints Culliton was under to bring the job in on time were stressed repeatedly by the responding party's witnesses. In an effort to complete the job on time, the employees were working a 50 hour, instead of a 40 hour, work week. Culliton was unable to complete the job on time with its existing complement of electricians and therefore placed an ad with Canada Manpower to hire more. In fact, at the time of Mr. Kasten's discharge, Culliton was still in the process of hiring men to work on the Manulife project.

57. Culliton had no problems with Mr. Kasten's job performance. He performed all of his job duties as an electrician adequately. The only problem Culliton had with Mr. Kasten was his use of the Walter Fedy telephone, a problem which is isolated to June 26 and 27, 1995.

58. At the time Mr. Williams was deciding what to do about Mr. Kasten's use of the phone he was aware of the fact that Culliton was still in the process of hiring men to work on Manulife. Mr. Williams had to realize that, if Mr. Kasten was terminated, he would have to be replaced. Either Mr. Williams or Mr. Diamond would be required to review additional resumes and conduct even more interviews. Mr. Williams' decision to terminate Mr. Kasten had the effect of losing a competent electrician when Culliton was in need of such skilled help and creating additional work for Messrs. Williams and Diamond. Thus, the decision to terminate Mr. Kasten cannot be explained on the basis that Mr. Williams wanted to handle the situation quickly and keep the job moving.

59. Further, we note that Mr. Diamond was aware of at least one explanation as to why Mr. Kasten may have been using the phone which, while not excusing his behaviour, would have cast it in a different light. Mr. Diamond was aware of the fact that Mr. Kasten had failed to provide his health card number on his job application form and had quite recently been reminded that it was required by Culliton's personnel office. In such circumstances, one would have expected Mr. Diamond to at least ask Mr. Kasten about his use of the phone.

60. We also view the circumstances surrounding the dismissal of Mr. Brown as dubious. Mr. Diamond suspected Mr. Brown of drinking on the job as of June 21, 1995, a matter which Mr. Diamond viewed as "very serious", and yet he did nothing about it until six days later and then only as an aside when discussing the problem of Mr. Kasten's use of the phone with Mr. Williams. According to Mr. Diamond, Mr. Brown's drinking only became a problem when he started using the knockout punch on June 26 and climbing a ladder on June 27. It was at this time that Mr. Brown represented a safety risk to himself and other employees.

61. Mr. Diamond must have known in advance of June 26, 1995 that Mr. Brown's job would soon require him to use a knockout punch and climb a ladder. If the matter was as serious as Mr. Diamond attested to, it is simply not probable that he would have waited until 11:00 a.m. on June 27, 1995 to phone Mr. Williams. Likewise, if the situation presented as serious a safety risk as Mr. Diamond testified to, it is not probable that Mr. Brown would be permitted to continue drinking and climbing a ladder until the end of the working day.

62. On balance, we are not persuaded that the problems with Mr. Brown were as serious as Culliton's suggests or the basis for his termination. Rather, the circumstances of Mr. Brown's termination suggest that he was terminated to lend credibility to the employer's assertion that Mr. Kasten was terminated for performance reasons and not as a result of his union membership.

63. As a result of the foregoing, we do not view the Culliton's assertion that Mr. Kasten was terminated for the use of the phone as probable.

64. When the circumstances surrounding Mr. Kasten's employment with Culliton and his termination therefrom are reviewed, it is our conclusion that Mr. Kasten's termination was motivated, at least in part, by his union membership and Culliton's apprehension that the union may be interested in organizing its employees.

65. We note that the fact that Mr. Kasten was a union member was noteworthy to the management staff of Culliton. Mr. Diamond considered it important enough to tell Mr. Hagerty, and Mr. Hagerty thought it important enough to pass on to Mr. Williams. The fact that Mr. Kasten was a union member was thus of some significance to these individuals.

66. A representative of the union was on the job site the very day that Mr. Kasten was terminated. The union representative's presence on the site was conveyed to Mr. Williams minutes before he made the decision to terminate Mr. Kasten.

67. Given the improbability of Culliton's explanation for terminating Mr. Kasten, Mr. Kasten's union membership and the presence of the union organizer on the Manulife job site on the date of his termination, it is our determination that Mr. Kasten's termination was motivated, at least in part, by his union membership and accordingly constitutes a violation of section 72 of the Act.

Circulation of Questionnaires

68. As indicated above, it is conceded by Culliton that Mr. Diamond is a manager. It is not disputed that, as a manager, his conduct is attributable to Culliton (see: *St. Laurent I.G.A.*, [1984] OLRB Rep. May 745).

69. Mr. Diamond participated in a conversation with Mr. Gray, in the presence of Messrs. Gunther and Sheerer, in which Mr. Diamond implicitly sanctioned the circulation of a questionnaire which asked questions in violation of section 119 of the Act. Mr. Diamond advised Mr. Gray as to when and where the questionnaire could be circulated. We do not accept that Mr. Diamond's conduct should be excused on the basis that he considered himself equally affected by the union's application as, prior to the Manulife job, it is asserted that he was not engaged in a managerial capacity. Mr. Diamond knew that his status as of the time of the discussion was managerial as is evidenced by his indication that he should not be the one to tell the employees about the meeting. In our view, as managerial employee, aware of his status as such, Mr. Diamond's conduct was a breach of the Act attributable to Culliton.

70. If Mr. Gray is a manager, his circulation of the questionnaires constitutes a further violation of the Act by Culliton (see: *St. Laurent I.G.A., supra*; *J. Pascal Inc.*, [1985] OLRB Rep. July 1075; *Rainscreen Metal Systems Incorporated*, [1989] OLRB Rep. May 482; and *Maverick Mechanical Contractors Limited*, [1996] OLRB Rep. Jan. 17).

71. It is our determination that Mr. Gray exercises managerial functions. During the period of time immediately prior to the circulation of the questionnaires, Mr. Gray was engaged as the foreman on the Corunna project. The Corunna project involved a considerable amount of high voltage work, Mr. Gray's area of specialty. Mr. Gray assisted Mr. Hagerty with the preparation of the estimate for the Corunna job, advising him on how the work would be performed and how he would organize the work. Mr. Gray provided Mr. Hagerty with advice on how the site conditions would affect the performance of the work. Mr. Gray's advice would indicate the number of man-hours it would take to complete the job and influence the estimate in this regard. Mr. Gray spent some time in Culliton's office working at a desk located outside of Mr. Hagerty's office doing take-offs from the blueprints and otherwise working on aspects of the estimate.

72. Once the Corunna job began, Mr. Gray assumed the role of foreman. Based on the evidence as summarized above as to a foreman's responsibilities, it is apparent that Mr. Gray was responsible for examining the blueprints, distributing work amongst the crew and ensuring that installations were performed in a good, workman-like manner. He was responsible for bringing any performance issues to the attention of Mr. Williams. He would raise the need for additional personnel with Mr. Williams or Mr. Hagerty. Mr. Gray would determine who would be assigned overtime work and was responsible for all safety issues. The office to job site co-ordinator would visit the job site only once every two weeks.

73. Based on the foregoing, Mr. Gray would have been involved in determining the manpower requirements for the Corunna job, determining how the work was to be performed and how such work was to be assigned. Once the job commenced, Mr. Gray was solely responsible for supervising the day-to-day operations on the job site. Mr. Gray supervised all work, determined when overtime was required, determined who worked the overtime and alerted higher management to a need to increase or decrease the employee complement on the job site or employee performance problems. Having regard to such circumstances, it is our determination that Mr. Gray was performing managerial functions in the course of his job duties on the Corunna project.

74. As a result of our determination that Mr. Gray is a manager, it follows that his circulation of the questionnaires constitutes a violation of the Act by Culliton.

Organizing Campaign

75. The responding party asserts that section 11 cannot be applied in the absence of a union organizing campaign and that a campaign is absent on the facts of the instant case. For the reasons that follow, it is our determination that the applicant was engaged in an organizing campaign at the time of the violations of the Act. As our determination in this regard is determinative of this issue, we make no comment with respect to whether the responding party's position, that section 11 cannot be applied in the absence of an organizing campaign, is sustainable.

76. Set out above are our findings of fact with respect to the nature and extent of the union's organizing campaign. The facts are derived largely from the agreed statement read to the Board setting out Mr. McKenzie's evidence. In summary, Mr. McKenzie visited a Culliton job site in November, 1994. In April, 1995, he obtained the location of Culliton job sites and the names and personality profiles of a number of Culliton electrical employees from Mr. Murray. On June 1, 1995, Mr. McKenzie visited one of the Culliton job sites Mr. Murray told him about and, in the course of speaking to Culliton

employees, found out about additional job sites. Mr. McKenzie was ordered off the job site by the Culliton foreman. In approximately the third week in June, the union set about contacting its unemployed members with a view to having them apply for work at Culliton and act as salts. Three such individuals were successful. The union had cards signed by three individuals. Prior to June 27, 1995, six additional Culliton employees were contacted by the union. On June 27, 1995, Mr. McKenzie attended at the Manulife job site, spoke to two employees, and spent 45 minutes walking around the job site. On July 10 and 11, the union contacted 17 employees. An additional salt was hired by Culliton on July 17 and two in August.

77. On the basis of the foregoing, it is clear that the union had commenced its organizing campaign and had taken active steps to organize the employees of Culliton by the time of Mr. Kasten's discharge.

Application of Section 11

78. As indicated above, the union has requested that it be certified pursuant to section 11 of the Act. Section 11 provides as follows:

11.(1) Upon the application of a trade union, the Board may certify the trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:

1. An employer, employers' organization or person acting on behalf of an employer or employers' organization has contravened the Act.
2. The result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.
3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.
4. The trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board to be appropriate for collective bargaining.

79. Having determined that the termination of Mr. Kasten and the circulation of the questionnaires constitute violations of the Act, it remains for us to determine whether the result of the violations is such that the true wishes of the employees would not be reflected in a vote; no other remedy, including a vote, would counter the effects of the violations; and whether the union has membership support adequate for the purposes of collective bargaining.

80. The responding party asserts that Mr. Kasten's termination could not have affected the employees' ability to express their true wishes as there is no evidence that Mr. Kasten's co-workers knew that he was a union member. As indicated above, the Nicholls-Radtke logo on Mr. Kasten's hard hat was an indicator to Messrs. Diamond, Williams and Hagerty that Mr. Kasten was a union member. Mr. Diamond, in conversation with Mr. Hagerty, referred to Mr. Kasten's hard hat as a "union hat". Mr. Kasten wore his Nicholls-Radtke hard hat while working on Manulife.

81. If Mr. Kasten's union membership was readily apparent to Mr. Diamond from his "union hat", it is the probable inference that it would have been equally apparent to his co-workers. In fact, Mr. Diamond did not dispute that it would have been obvious to people on the job that Mr. Kasten was a union member from the logo on his hard hat. Accordingly, we are not persuaded that Mr. Kasten's co-workers were not aware that he was a union member.

82. As far as the evidence demonstrates, Mr. Kasten was the only individual to wear a union hard hat. Mr. Kasten was abruptly fired without compelling reason from a very time sensitive job on the very day that an IBEW representative spent 45 minutes touring the site in full view of the employees. The IBEW representative spoke with two employees. In our view, under such circumstances, it is entirely likely that Culliton's employees associated Mr. Kasten's termination with his union membership. We are supported in this determination by the evidence of Mr. McKenzie which was agreed to by the parties wherein it is stated that one employee he contacted on July 10 or 11, 1995, who had previously expressed an interest in talking to him, indicated that Culliton had gotten rid of "one union guy". Thus, it appears that this individual knew of Mr. Kasten's union membership and felt he had been terminated as a result.

83. The responding party asserts that Mr. Gray's circulation of the questionnaires could not have impacted on the employees' ability to express their true wishes as the union contacted 17 employees on July 10 and 11, 1995, who (aside from the five salts whose support for the union remained unchanged) would not speak to the union. In the responding party's submission, such evidence indicates that, as of July 10 or 11, 1995, the employees' support or lack thereof for the union had already been determined. We do not agree. There were at least 25 employees in the bargaining unit on the date of application. We have no evidence as to whether at least eight of the employees had or had not made up their minds on the issue of union representation prior to Mr. Gray's circulation of the questionnaires. Further, simply because an employee indicated he was not interested in the union on July 10 does not mean that subsequent events could have no impact.

84. Finally, the responding party suggests that Mr. Kasten's reinstatement on July 14, 1995 had the effect of reversing any adverse impact his termination may have had on the ability of his co-workers to express their true wishes. We do not accept that Mr. Kasten's reinstatement would have ameliorated the impact of his discharge. The Board has rejected this proposition in similar circumstances on a number of occasions (see: *Zest Furniture Industries Limited*, [1987] OLRB Rep. Feb. 299; *Elbertsen Industries Limited*, [1984] OLRB Rep. Nov. 1564; *J. Sousa Contractor Limited*, [1988] OLRB Rep. Oct. 1027). In addition, even if Mr. Kasten's reinstatement had the effect of reassuring some of the employees, it is our view that the circulation of the questionnaires immediately thereafter would have caused the employees to once again question whether supporting the union would not amount to a threat to their job security.

85. The Board has commonly held that the termination of a union supporter has a chilling effect on the members of the bargaining unit by demonstrating to them that the employer is prepared to use its economic power to penalize employees who seek to exercise their rights under the Act and that such a termination makes it unlikely that their true wishes regarding union representation may be ascertained (see: *Carleton University Students' Association Inc.*, [1993] OLRB Rep. Oct. 938; *Royal Shirt Company Limited*, [1993] OLRB Rep. Nov. 1177; *CMP Group (1985) Ltd.*, [1993] OLRB Rep. Dec. 1247; *Domus Industries Ltd.*, [1994] OLRB Rep. Dec. 1630; *Basile Interiors Ltd.*, [1994] OLRB Rep. Aug. 963; *Barton Feeders Inc.*, [1993] OLRB Rep. Feb. 89). In *DI-AL Construction Limited*, [1983] OLRB Rep. Mar. 356, the Board described the effect of the termination of a union supporter on his co-workers in the following terms:

10. A discharge is one of the most flagrant means by which an employer can hope to dissuade his employees from selecting a trade union as their bargaining agent. The respondent's action in discharging Mr. Holland because of his support for the union would have made clear to employees the depth of the respondent's opposition to the union and likely have created concerns among them that if they were also to support the union, it might jeopardize their own employment. In the face of the discharge I doubt that the employees would now be able to freely decide for or against trade union representation. This is particularly so given the small size of the bargaining unit and the respondent's earlier conduct. In these circumstances, I am satisfied that because of the respondent's unlawful conduct, the current true wishes of the employees are not likely to be ascertained in a

representation vote. Accordingly I am of the view that the applicant should be certified pursuant to the provisions of section 8 of the Act.

86. Accordingly, it is our determination that Culliton's discharge of Mr. Kasten and the circulation of the questionnaires would have caused the employees to be concerned that, if they were to support the union, their own employment would be in jeopardy. As a result, we do not believe that a representation vote would likely reflect the true wishes of the employees. Given the gravity of the violations, we are also of the view that there is no other remedy, including the taking of a representation vote, which would counter the effects of the violations.

87. Finally, we must consider whether the union has adequate membership support for the purposes of collective bargaining. The union has filed six membership cards. Removing Mr. Gray from the list of employees, as we have concluded that he is managerial, and adding Mr. Kasten, the maximum number of employees on the list for the purposes of the count would be 30. If all of the union's challenges were successful, the number of employees on the list for the purposes of the count would be 25.

88. There is no precise numerical level of support stipulated in the Act, nor has the Board in past cases, decided under a similar provision that existed prior to Bill 40, applied a bright line test of a particular percentage of support required to meet this condition. Rather, the Board has regard to the circumstances of the case before it. Some of the factors the Board has considered were set out in *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848, as follows:

- (1) the stage of the union's campaign at which the employer conduct occurred (*Skyline Hotel Limited*, [1980] OLRB Rep. Dec. 1811; *District of Algoma Home for the Aged (Algoma Manor)*, [1979] OLRB Rep. Apr. 269);
- (2) the circumstances surrounding the cards signed prior to the employer interference and the number of cards signed (*Lorain Products*, [1977] OLRB Rep. Nov. 734);
- (3) the existence of a full-time unit which showed membership sufficient to support collective bargaining by its part-time counterpart (*Robin Hood Multifoods*, [1981] OLRB Rep. July 972; *Windsor Airline Limousine Limited*, [1981] OLRB Rep. Mar. 398);
- (4) the severity of the employer conduct insofar as it related to the number of cards signed - "the chilling effect" (*K-Mart*, [1981] OLRB Rep. Jan. 60);
- (5) the percentage of unit signing the cards where support for the union is at an extremely low level (5%) (*Sommerville Belkin*, [1980] OLRB Rep. May 796).

89. In the instant case, the violations committed were severe and occurred at the beginning of the union's attempt to solicit membership amongst Culliton's employees. Culliton's conduct, being swift and sure, can be said to have nipped any organizing efforts in the bud. We simply cannot and do not find on the facts that the organizing campaign had already faltered at the time of the unfair labour practices. Because of the early stage at which the employer's unfair labour practices occurred, one would expect the union's level of support, as evidenced by signed cards, to be somewhat low. With respect to the ICI sector of the construction industry, the Act operates to automatically bind an employer certified pursuant to an application under 158(1) to the provincial agreement to which the applicant trade union is bound (see *J. Sousa Contractor Limited*, [1988] OLRB Rep. Oct. 1027). As a result, the union is not required to engage in collective bargaining in order to achieve its first ICI agreement and will not be required to engage in bargaining for an ICI agreement until such expires in April, 1998. Having regard to the foregoing circumstances, it is our view that the union has adequate membership support for the purposes of collective bargaining.

90. We are thus satisfied that all of the elements necessary for certification under section 11 have been established by the union. Accordingly, we find it appropriate to certify the union pursuant to section 11.

91. Section 160(1) of the Act provides for the issuance of one certificate confined to the industrial, commercial and institutional sector and a second certificate in relation to all other sectors in the appropriate geographic area(s). Therefore, pursuant to section 160(1) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario in respect of all electricians and electricians' apprentices in the employ of Culliton Brothers Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

92. Further, pursuant to section 160(1) of the Act, a certificate will issue to the applicant trade union in respect of all electricians and electricians apprentices in the employ of Culliton Brothers Limited in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

93. Further, with respect to the responding party's violations of the Act as aforesaid, the Board directs, pursuant to section 96 of the Act, that the responding party:

- (a) compensate Gary Kasten for his lost wages and benefits for the period of his termination less the amount of his earnings from other employment during this period; and
- (b) sign and post one copy of the attached notice marked Appendix "A" in conspicuous places at each of its premises and job sites, and to keep such notices posted for 15 working days and to take all reasonable steps to ensure that the notices are not altered, defaced or covered up.

94. The Board will remain seized of this matter with respect to the implementation of this decision, including the calculation of the amounts of compensation in paragraph 93 (a) above should there be any disagreement with respect thereto.

Appendix "A"

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

THIS NOTICE HAS BEEN POSTED IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH THE UNION AND THE COMPANY PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT CULLITON BROTHERS LIMITED VIOLATED THE LABOUR RELATIONS ACT, 1995 BY TERMINATING GARY KASTEN AND BY CIRCULATING QUESTIONNAIRES ENQUIRING ABOUT EMPLOYEES' UNION MEMBERSHIP.

THE ONTARIO LABOUR RELATIONS BOARD HAS CONCLUDED THAT THE TRUE WISHES OF THE EMPLOYEES WERE NOT LIKELY TO BE ASCERTAINED AND HAS CERTIFIED THE UNION AS BARGAINING AGENT FOR:

ALL ELECTRICIANS AND ELECTRICIANS' APPRENTICES EMPLOYED BY CULLITON BROTHERS LIMITED IN THE INDUSTRIAL, COMMERCIAL AND INSTITUTIONAL SECTOR OF THE CONSTRUCTION INDUSTRY IN THE PROVINCE OF ONTARIO AND IN ALL OTHER SECTORS OF THE CONSTRUCTION INDUSTRY IN THE REGIONAL MUNICIPALITY OF WATERLOO (EXCEPT THAT PORTION OF THE GEOGRAPHIC TOWNSHIP OF BEVERLY ANNEXED BY NORTH DUMFRIES TOWNSHIP). SAVE AND EXCEPT NON-WORKING FOREMEN AND PERSONS ABOVE THE RANK OF NON-WORKING FOREMAN.

THE LABOUR RELATIONS ACT, 1995 GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF OUR EMPLOYEES THAT WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

CULLITON BROTHERS LIMITED

PER: _____
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

THIS NOTICE MUST REMAIN POSTED FOR 15 CONSECUTIVE WORKING DAYS.

DATED THIS 16TH DAY OF JULY, 1996.

2817-95-G; 2818-95-R Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen Local 2, Ontario, and Marble Tile & Terrazzo Union, Local 31, Applicants v. **Dineen Construction Limited**, Mitchell Construction Limited, Buttcon Limited, M.A. Butt Construction Limited, M.A. Butt Construction (1983) Limited, Responding Parties v. Terrazzo, Tile & Marble Guild of Ontario, Inc., Intervenor

Bargaining Rights - Construction Industry - Construction Industry Grievance - Related Employer - Sale of a Business - Board holding that Ontario Provincial Conference (OPC) designation for tile and terrazzo workers limits OPC's representation rights to journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers and their helpers for whom OPC, one of the specified locals, or a subsequently chartered local has bargaining rights - Board not accepting that sub-contracting clause in provincial bricklayers' agreement requiring contractors bound to the agreement to sub-contract work covered by provincial marble, tile and terrazzo agreement to contractor bound by such agreement - Board accordingly determining that responding parties not bound to provincial marble, tile and terrazzo agreement, nor are they required by provincial bricklayers' agreement to subcontract tile and terrazzo work to contractor bound by provincial bricklayers' agreement or provincial, marble tile and terrazzo agreement

BEFORE: *D. L. Gee*, Vice-Chair.

APPEARANCES: *N. L. Jesin* for the applicants, *Jerry Coelho* for the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen Local 2; *Ron Anthony* for Marble Tile & Terrazzo Union, Local 31; *Bruce Binning*, *Brian Foote* and *Michael Butt* for Buttcon Limited; *Bob Sanelli* for the intervenor.

DECISION OF THE BOARD; August 6, 1996

1. Board File No. 2817-95-G is a referral of a grievance to arbitration pursuant to section 133 of the *Labour Relations Act, 1995* (the "Act"). Board File No. 2818-95-R is an application under sections 1(4) and 69 of the Act.
2. Buttcon Limited ("Buttcon") was the only responding party to file a response or attend at the hearing of this matter. The intervenor did not file an intervention or participate in the hearing other than to inform the Board that the intervenor supports the applicants' position.
3. Buttcon disputes that it is under common control or direction with any of the remaining responding parties or that there has been a sale of a business by any of the responding parties to Buttcon. In addition, there is a dispute as to the scope of the applicants' bargaining rights.
4. At the commencement of the hearing, the parties agreed to present the Board with evidence and argument on the scope of the applicants' bargaining rights, and obtain the Board's determination with respect thereto, prior to dealing with the merits of the applications. Accordingly, this decision is confined to dealing with this issue.

The Issue

5. It is not disputed that Dineen Construction Limited ("Dineen"), Mitchell Construction Limited ("Mitchell") and M.A. Butt Construction Limited ("Butt") are bound to the Provincial

Agreement (the "Provincial Bricklayers Agreement") for bricklayers, stonemasons and plasterers between the International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (the "OPC") and the Masonry Industry Employers Council of Ontario ("MIECO"). What is disputed is the applicants' assertion that, by virtue of being bound to the Provincial Bricklayers Agreement, Dineen, Mitchell and Butt are also bound to the Provincial Agreement for Marble, Tile, Terrazzo, Cement Masons, Resilient Floor Layers and their Helpers between the OPC and the Terrazzo, Tile & Marble Guild of Ontario Inc. (hereinafter the "Provincial Marble, Tile and Terrazzo Agreement"). The applicants argue in the alternative, based on the sub-contracting clause in the Provincial Bricklayers Agreement, that contractors bound to the Provincial Bricklayers Agreement are required to sub-contract all work encompassing the skills of members of the OPC, which includes the work of marble, tile, terrazzo, cement masons, resilient floor layers and their helpers, to a contractor who will assign the work to members of the OPC who possess the required skills. This would involve sub-contracting the work to a contractor who would perform the work under the terms of the Provincial Bricklayers Agreement or a contractor bound to the Provincial Marble, Tile and Terrazzo Agreement.

6. Dineen and Mitchell became bound to the Provincial Bricklayers Agreement through their membership in the General Contractors Section of the Toronto Construction Association ("GCS-TCA"). Hence, the determination of this issue will impact on not only Dineen and Mitchell but all members of the GCS-TCA. In fact, the Board's determination may very well impact on all contractors signatory to the Provincial Bricklayers Agreement.

The Facts

7. Mr. Brian Foote, the Director of Labour Relations for the GCA-TCA was called as a witness on behalf of Buttcon. Mr. Jerry Coelho, the President of the OPC, was called as a witness by the applicants. As indicated above, the intervenor did not call any evidence or make any submissions other than to indicate that the intervenor supports the applicants' position.

8. The GCS-TCA first signed an agreement with the Bricklayers, Stone Masons and Tilesetters Union, Local No. 2 Ontario in approximately the 1950's. The Board was provided with a copy of an agreement dated July 21, 1969 between the GCS-TCA and All Masonry Contractors, Members of the Toronto Construction Association and the Bricklayers, Stone Masons and Tilesetters Union, Local No. 2 Ontario (Affiliated with the Bricklayers, Masons and Plasterers International Union of America) (hereinafter the "Local 2 Agreement"). The scope of the Local 2 Agreement was limited to a defined section of Board Area 8. The Local 2 Agreement contained the following sub-contracting clause:

1. TERMS OF AGREEMENT

• • •

(e) Any employer who is a party to this Agreement, desirous of sub-contracting masonry or brick-work, shall only sub-contract same to an employer who has a signed Agreement with the Union, adopting all of the relevant provisions of this Agreement.

• • • •

9. The Local 2 Agreement was renewed by the parties with minor revisions by agreement dated May 20, 1971.

10. By Board decision dated February 6, 1975, the Terrazzo, Tile & Marble Guild of Ontario Inc. was accredited to represent employers of terrazzo, tile and marble workers and their helpers in the Province of Ontario and cement masons and resilient floor layers and their helpers in respectively

defined geographic areas for whom the Ontario Provincial Conference of the Bricklayers, Masons and Plasterers' International Union of America held bargaining rights in the industrial, commercial and institutional, sewers, tunnels and watermains, roads and heavy engineering sectors. No members of the GCS-TCA are listed in the final Schedule "E" or "F" determined by the Board.

11. Effective May 24, 1976, a province-wide agreement was entered into between the OPC and MIECO. The sub-contracting clause of this agreement read as follows:

ARTICLE 1 - RECOGNITION AND SUB-CONTRACTING

• • •

(c) Any employer who is party to this Agreement desirous of sub-contracting any work encompassing the skills of Members of the Ontario Provincial Conference, shall only sub-contract same to a sub-contractor who has signed the Provincial Agreement with the Ontario Provincial Conference.

12. The agreement contains an Appendix "B" which sets out the territorial jurisdictions of the OPC. Amongst the territorial jurisdictions listed is one for "Local Union No. 2 - Toronto - Bricklayers and Masons" which is defined as roughly the Metropolitan Toronto area and one for "Local Union No. 31 - Toronto - Marble, Tile and Terrazzo" which is also roughly the Metropolitan Toronto area. As the names of each of the locals indicate, Local 2 has jurisdiction in the Metropolitan Toronto area for bricklayers and masons and Local 31 has jurisdiction in the Metropolitan Toronto area for marble, tile and terrazzo masons.

13. Appendix "G" to this agreement is an agreement dated May 24, 1976 between the GCS-TCA and Local 2 Bricklayers, Stonemasons and Tilesetters Union Represented by the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen. This agreement provides as follows:

It is hereby agreed and declared by and between the Parties hereto that the following provisions constitute a Collective Agreement:

1. The terms and conditions of the attached Collective Agreement and Appendices between the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the Masonry Industry Employers Council of Ontario, dated the 24th day of May, 1976, be adopted except as amended hereby.
2. The said terms and conditions shall be amended where necessary to apply only between the Parties hereto within the following area:

Area 8. Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton, save and except all territory lying west of the Sixteen Mile Creek in Oakville, from the shore of Lake Ontario to the Queen Elizabeth Highway, and all territory lying west of the Sixth Line, north from the Queen Elizabeth Highway) and the Township of Pickering in the County of Ontario.

3. The attached list of Employers constitutes the General Contractors Section of the Toronto Construction Association.
4. Any notice served on the Masonry Industry Employers Council of Ontario shall be

deemed to have also been served on the Toronto Construction Association, General Contractors Section, as a participating Party to this Agreement.

DATED AT TORONTO, THIS 27TH DAY OF JULY, 1976.

SIGNED ON BEHALF OF THE
GENERAL CONTRACTORS
SECTION OF THE TORONTO
CONSTRUCTION ASSOCIATION

SIGNED ON BEHALF OF LOCAL
2 BRICKLAYERS, STONEMASONS
AND TILESETTERS UNION
REPRESENTED BY THE
ONTARIO PROVINCIAL
CONFERENCE OF THE
INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED
CRAFTSMEN

14. The terminology of the sub-contracting provision contained in the province-wide agreement (set out above) was intended to permit contractors who were bound to the province-wide agreement to sub-contract work to contractors bound to the GCS-TCA agreement with Local 2.

15. On November 24, 1977, By-law No. 3 was enacted by the Ontario Masonry Contractors' Association. In anticipation of the introduction of province-wide bargaining in the industrial, commercial and institutional sector of the construction industry and the designation of employer bargaining agencies, By-law No. 3 establishes MIECO (referred to in the By-law as the "Council") as a committee to act as an employers' organization to negotiate, sign and administer collective agreements on behalf of employers. The By-law stipulates that MIECO shall represent:

... all, full contractor and affiliate contractor members of the Ontario Masonry Contractors' Association, any masonry industry employer which it is authorized to represent by law and any masonry industry employer who authorizes the Council to represent it for the purpose of negotiating collective agreements with the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen covering bricklayers, stonemasons, and plasterers, their respective apprentices, improvers and working foremen and with the Ontario Provincial Council, Labourers International Union of North America covering mason tenders.

16. The By-law directs MIECO to elect two steering committees to advise and guide the bargaining committees in negotiating and administering collective agreements. Twenty-five percent of the representation on the steering committees is to be general contractors represented by the Labour Relations Council of the Ontario General Contractors Association. The GCS-TCA is the affiliate of the Labour Relations Council appointed to the steering committee and accordingly has 25 percent of the votes on the steering committees.

17. Under the heading "Authorization-Bargaining Rights", the By-law provides as follows:

The Council may require that each full contractor member and each affiliate contractor member of the Ontario Masonry Contractors' Association authorize the Council to bargain collectively on its behalf as its sole and exclusive bargaining agent. The Council may accept from any employer who is not a member of the Ontario Masonry Contractors' Association, but whose employees are represented by either or both of the aforesaid Bricklayers or Labourers Unions an authorization that the Council may bargain collectively on its behalf as its sole and exclusive bargaining agent. There shall be no unjust discrimination against non-members with respect to membership or otherwise and all non-members shall be covered under the Council's collective agreements to the same extent and in the same manner as members.

MIECO is not authorized to represent employers who employ marble, tile and terrazzo workers and has in fact never done so. It has never participated in the negotiation of the Provincial Marble, Tile and Terrazzo Agreement.

18. In 1977, the *Labour Relation Act* was amended to provide for province-wide bargaining in the industrial, commercial and institutional sector of the construction industry (*The Labour Relations Amendment Act, 1977*, S.O. 1977, c31). What is now section 153 of the Act was introduced at that time. Section 153 reads as follows:

153(1) The Minister may, upon such terms and conditions as the Minister considers appropriate,

- (a) designate employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and describe those provincial units;
- (b) despite an accreditation of an employers' organization as the bargaining agent of employers, designate employer bargaining agencies to represent bargaining provincial units of employers for whose employees affiliated bargaining agents hold bargaining rights, and describe those provincial units.

19. By designation dated March 29, 1978 (amended April 12, 1978), the Minister designated the OPC as the employee bargaining agency to represent in bargaining:

... all journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers and their helpers represented by the following affiliated bargaining agents:

- 1. The International Union of Bricklayers and Allied Craftsmen and The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen; or
- 2. The following Local Unions: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 12, 14, 16, 17, 20, 23, 25, 28, 29, 30, 31, 33 and 36; or
- 3. any other Local of the International Union of Bricklayers and Allied Craftsmen which in the future may be chartered to represent journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers and their helpers.

(which Conference and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

20. On the same date, the Minister designated the OPC as the employee bargaining agency to represent in bargaining:

... all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers represented by the following affiliated bargaining agents:

- 1. The International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen; or

2. The following Local Unions: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 20, 23, 25, 28, 29, 30, 31, 33 and 36; or
3. Any other Local of the International Union of Bricklayers and Allied Craftsmen which in the future may be chartered to represent journeymen bricklayers, stonemasons and plasterers and their respective apprentices and improvers.

(which Conference and Unions are hereinafter collectively referred to as "the Unions"), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid all employees bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

21. The Minister designated the Terrazzo, Tile & Marble Guild of Ontario, Inc. as the employer bargaining agency for the tile and terrazzo workers and the MIECO as the employer bargaining agency for bricklayers.

22. Following the introduction of province-wide bargaining, the OPC and MIECO have negotiated province-wide agreements for bricklayers, stonemasons and plasterers. As indicated above, the GCS-TCA has a 25 percent vote in a steering committee established by MIECO to advise and guide the bargaining committees in negotiating and administering collective agreements. Accordingly, the GCS-TCA has been actively involved in the negotiation of the Provincial Bricklayers Agreement from 1978 to present.

23. Similarly, following the introduction of province-wide bargaining, the OPC has negotiated a province-wide agreement with the Terrazzo, Tile & Marble Guild of Ontario, Inc. for marble, tile, terrazzo, cement masons, resilient floor layers and their helpers. The GCS-TCA has no input or involvement in the negotiation of the Provincial Marble, Tile and Terrazzo Agreement.

24. The Provincial Bricklayers Agreement, effective July 28, 1995 to April 30, 1998, contains the following provisions regarding recognition and sub-contracting:

ARTICLE 1

Recognition and Sub-Contracting

- (a) The Employer recognizes the Union as the exclusive bargaining agent for Bricklayers, Stonemasons and Plasterers, their respective Apprentices, Improvers and Working foremen in his employ in the Province of Ontario, in areas described in Appendix "B" hereto.

• • •

- (c) Any Employer who is a party to this Agreement desirous of contracting or sub-contracting any work encompassing the skills of members of the Ontario Provincial Conference shall only sub-contract same to a contractor or sub-contractor who is bound by the Provincial Agreement with the Ontario Provincial Conference.

• • •

Appendix "B" to the Provincial Bricklayers Agreement sets out the territorial jurisdictions of the OPC. It lists, amongst numerous others, "Local 2 - Toronto" and "Local Union No. 31A -Toronto Marble, Tile and Terrazzo". Appendix "B" is not generally negotiated by the parties to the agreement. MIECO generally has no interest in how the territorial jurisdictions of the OPC are defined and makes no objection to the increase or decrease in the number of locals listed in the appendix.

25. The Provincial Marble, Tile and Terrazzo Agreement contains the following provisions regarding recognition and sub-contracting:

ARTICLE I

RECOGNITION AND SUB-CONTRACTING

- (a) The Employer recognizes the Union as the exclusive bargaining agent for Marble, Tile & Terrazzo, Cement Masons and Resilient Floor Layers and their Helpers, their respective Apprentices, Improvers and Working Foremen in his employ in the Province of Ontario working in the areas described in Appendix B hereto.

...

- (c) Any Employer who is party to this Agreement desirous of sub-contracting any work encompassing the skills and members of the Ontario Provincial Conference and only after the Employer has first requested the Local Union to supply members in order to perform the work itself and members of the Local Union are not available as requested, shall only then sub-contract same to a Sub-Contractor who has signed the Provincial Agreement with the Ontario Provincial Conference.

Appendix "B" to the Provincial Marble, Tile and Terrazzo Agreement is a list of the territorial jurisdictions of the OPC. Amongst the locals listed are "Local Union No. 2 - Toronto Bricklayers and Masons" and "Local Union No. 31 -Toronto Marble, Tile and Terrazzo and Helpers".

26. Each of the Provincial Bricklayers Agreement and the Provincial Marble, Tile and Terrazzo Agreement contain an appendix concerning trade jurisdiction. The description of each trade's jurisdiction is lengthy and quite detailed. The two appendices are quite different and overlap in very few respects.

27. Each agreement also contains a list of employers that are bound to the agreement. The list of employers contained in the Provincial Marble, Tile and Terrazzo Agreement does not include any members of the GCS-TCA. Most of the members of the GCS-TCA appear in the list of employers contained in the Provincial Bricklayers Agreement.

28. The Board was provided with a copy of *Harbridge & Cross Limited*, [1989] OLRB Rep. April 391; OLRB Rep. July 824 (judicial review application dismissed); [1989] OLRB Rep. Oct. 1093 (motion for leave to appeal dismissed). Notwithstanding that the applicant in that case is named as the Ontario Council of the International Brotherhood of Painters and Allied Trades, the matter was carried by the Building Trades Council of which Local 31 of the OPC is a member. The decision sets out a statement of facts which was agreed to between the parties. The statement of facts lists the collective agreements to which, at the times material to the proceedings, the Toronto Building Trades Council was a party with the Toronto Construction Association. It is indicated that the Toronto Construction Association had a bargaining relationship with the International Union of Bricklayers and Allied Craftsmen, Local 2. There is no mention of a bargaining relationship with the International Association of Bricklayers and Allied Craftsmen, Local 31.

29. There are a number of examples where a local of a union is named in more than one designation order. For example, Locals 700, 721, 736, 759, 765 and 786 of the International Association

of Bridge, Structural and Ornamental Iron Workers and the Iron Workers District Council of Ontario are named in the employee bargaining agency designation for both the International Association of Bridge, Structural and Ornamental Iron Workers and the Iron Workers District Council of Ontario with respect to ironworkers as well as the employee bargaining agency designation for the International Association of Bridge, Structural and Ornamental Iron Workers and the Iron Workers District Council of Ontario with respect to rodmen. The Ontario General Contractors Association is part of the employer bargaining agency designation with respect to rodmen but not with respect to iron workers. Locals 183 and 506, amongst others, of the Labourers' International Union of North America are listed in the employee bargaining designations for construction labourers, labourers pre-cast, and labourers demolition.

30. Local 2 and Local 31 are both affiliates of the OPC. Local 2 has jurisdiction in the Toronto area for bricklayers, stonemasons and plasterers. Local 31 has jurisdiction in the Toronto area primarily for the marble and tile field. Toronto is the only area in which jurisdiction over bricklaying and marble and tile is split between two locals. In all other areas, one local of the OPC has jurisdiction for both.

31. Outside of Toronto, the local assigned to the particular territory would be responsible for enforcing both the Provincial Bricklayers Agreement and the Provincial Marble, Tile and Terrazzo Agreement. Mr. Coelho testified as to how Local 7 operates in the Ottawa area. In the Ottawa area, if a contractor bound to the Provincial Bricklayers Agreement sub-contracts tile work, Local 7 would insist that the work be sub-contracted to a contractor who would employ members of that Local 7 to do the work based on the sub-contracting clause in the Provincial Bricklayers Agreement. A contractor could do the work under the Provincial Bricklayers Agreement or under the Provincial Marble, Tile and Terrazzo Agreement provided members of Local 7 were used to perform the work.

32. There are separate trade schools for individuals who wish to become bricklayers or stonemasons than for individuals who wish to become tile and terrazzo workers. When an individual wishes to become a member of Local 7, the individual completes an application. Part of the application requires the individual to indicate his/her area of training. When Local 7 gets a request from a contractor for help, the local sends out someone with the appropriate training.

Submissions

33. The applicants submit that, because Local 2 is listed in the employee bargaining agency designation for both the bricklayers and the tile and terrazzo workers, that all employers whose employees are represented by Local 2 are bound to both the Provincial Bricklayers Agreement and the Provincial Marble, Tile and Terrazzo Agreement. At the time of the designations, the GCS-TCA represented employers whose employees were represented by Local 2. Thus, the applicants submit that the members of the GCS-TCA are bound to both agreements. The applicants argue that, if such was not the intended result of listing Local 2 in both designations, there would have been no reason for doing so.

34. In support of their position, the applicants rely on the wording of the employee bargaining agency designation relating to tile and terrazzo workers. The applicants point to the fact that, following the words "without limiting the generality of the foregoing", the latter part of the designation designates the OPC as the employee bargaining agency to represent in bargaining:

... all employees bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;

- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

Members of the GCS-TCA are bound to collective agreements to which “the Unions” (defined earlier in the designation as including Local 2) are a party and accordingly, the applicants submit that the OPC is designated as the employee bargaining agency to represent their tile and terrazzo employees in bargaining.

35. The applicants acknowledge that the result of their argument would be the creation of bargaining rights. Prior to the designation order, no union had the right to represent the tile and terrazzo employees of members of the GCS-TCA. The effect of accepting the applicants’ position would be to grant such rights to Local 2. The applicants submit that section 153(1) of the Act granted the Minister the power to act on such terms as she considered appropriate. If the Minister wanted to ensure that all employers for whom the OPC holds bargaining rights were covered by the designation, one way of doing it would be to include everyone in both designations. In this manner, the Minister would ensure that all employers were covered and at the same time preserve the two separate agreements that existed for each trade.

36. The applicants point to the reference to both Local 2 and Local 31 in the appendices to both the Provincial Bricklayers Agreement and the Provincial Marble, Tile and Terrazzo Agreement as being consistent with the designations and evidence that the parties have agreed that an employer whose employees are represented by either of the two locals is bound to both of the provincial agreements.

37. In the alternative, the applicants argue that the sub-contracting clause in the Provincial Bricklayers Agreement requires contractors to sub-contract work that encompasses the skills of tile and terrazzo workers to members of the OPC. The applicants are not concerned with whether the contractor to whom the work is sub-contracted performs the work under the Provincial Bricklayers Agreement or the Provincial Marble, Tile and Terrazzo Agreement. The applicants want the work performed by members of the OPC.

38. Buttcon disputes that the effect of the employee bargaining agency designation for tile and terrazzo workers is to bind all employers who employ employees covered by a collective agreement with Local 2 to the Provincial Marble, Tile and Terrazzo Agreement. In Buttcon’s submission, the bricklayers and tile and terrazzo workers comprise two completely separate trades covered by two completely separate agreements.

39. Buttcon points to the fact that the recognition provision of the Provincial Bricklayers Agreement and the employee bargaining agency designation for bricklayers is limited to “bricklayers, stonemasons and plasterers and improvers”. Likewise, the recognition provision for the Provincial Marble, Tile and Terrazzo Agreement and the employee bargaining agency designation for tile and terrazzo workers is limited to “marble, tile, terrazzo, cement masons, resilient floor layers and their helpers”. Each agreement contains a lengthy and detailed trade jurisdiction appendix. The trade jurisdictions of the two trades overlap in only very minor respects. The agreements and the designations highlight that they are each concerned with separate trades. The fact that individuals wishing to become bricklayers attend separate trade schools from individuals wishing to become tile and terrazzo workers, further highlights the disparity between the trades.

40. Buttcon points out that, pursuant to By-law No. 3 of the Ontario Masonry Contractors’ Association, MIECO is only authorized to negotiate collective agreements with the Bricklayers covering bricklayers, stonemasons, and plasterers, their respective apprentices, improvers and working foremen

and with the Labourers covering mason tenders. MIECO is not authorized to negotiate collective agreements pertaining to tile and terrazzo workers.

41. Buttcon submits that the fact that the GCS-TCA forms no part of the designated employer bargaining agency with respect to tile and terrazzo workers is the result of the fact that, prior to 1978, the GCS-TCA was not bound to an agreement covering tile and terrazzo workers. Had such been the case, they would have been given a role to play in the tile and terrazzo workers' designated employer bargaining agency as they were in the bricklayers' employer bargaining agency. The Board's accreditation decision concerning the Terrazzo, Tile & Marble Guild of Ontario, Inc. lists no general contractors on either Schedule "E" or "F". In the *Harbridge & Cross, supra*, decision, the Building Trades Council, of which Local 31 is a member, agreed that the GCS-TCA was only bound to the Provincial Bricklayers Agreement.

42. Buttcon further points out that mixed locals (locals listed in more than one designation) are not uncommon. Local 721 of the International Association of Bridge, Structural and Ornamental Iron Workers and the Iron Workers District Council of Ontario is listed in the employee designation for both the rodmen and iron workers. The GCS-TCA is bound to the province-wide agreement for rodmen but not to the province-wide agreement for iron workers.

43. Buttcon disputes that the designation orders can create bargaining rights. In Buttcon's submission, either the employee bargaining agency or one of the affiliated bargaining agents must hold bargaining rights for employees within the trade covered by the designation by virtue of a certification, voluntary recognition or collective agreement before the employee bargaining agency has the right to represent those employees.

44. With respect to the applicants' alternative argument, Buttcon submits that article 1(c) of the sub-contracting clause must be read with article 1(a). The reference to "the Provincial Agreement" in article 1(c) is a reference to the Provincial Bricklayers Agreement. In Buttcon's submission, it would be ludicrous to interpret the sub-contracting clause to require contractors to sub-contract work under a totally different collective agreement which they have no right to participate in negotiating. It would mean that the parties to the other agreement could decide to, for example, include carpentry work within its terms and the parties to the agreement containing the sub-contracting clause would be bound as a result.

Decision

i) Designation

45. The applicants' rely on the employee bargaining agency designation of the OPC with respect to tile and terrazzo workers to assert bargaining rights with respect to the marble, tile, terrazzo, cement masons, resilient floor layers and their helpers employed by the responding parties.

46. The designation names the OPC as the designated employee bargaining agency to represent "all journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers and their helpers" represented by the OPC, specified locals of the OPC and any other local of the OPC subsequently chartered to represent "all journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers and their helpers" working in the ICI sector of the construction industry. The designation then indicates that "without limiting the generality of the foregoing", the OPC is designated to represent "in bargaining *as aforesaid* all employees bound by or parties to" certificates granted to the unions, voluntary recognition agreements with the unions, or collective agreements with the unions covering the ICI sector. In my view, the phrase "as aforesaid" indicates that the OPC is designated to represent in bargaining those employees *as described in the initial portion of the*

designation for whom the unions have acquired bargaining rights in one of the three ways specified in the latter portion of the designation. I do not accept that the portion of the designation following “without limiting the generality of the foregoing” has the effect of completely overriding the initial portion of the designation which defines the trade the OPC is designated to represent and granting the OPC the right to represent employees represented by any of its locals regardless of trade. Thus, I am not persuaded that the language of the designation bears the interpretation urged upon me by the applicants.

47. Further, the applicants’ interpretation of the designation would mean that bargaining rights could be created by way of designation. The Act, in very specific terms, sets out how bargaining rights can be acquired. Nowhere is it specified that the Minister has, or had, the power to create bargaining rights by way of designation. Hence, I do not accept the proposition that bargaining rights can be created by designation.

48. Accordingly, it is my determination that the OPC designation for tile and terrazzo workers limits the OPC’s representation rights under such designation to the representation of journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers and their helpers for whom the OPC, one of the specified locals, or a subsequently chartered local, has acquired bargaining rights.

ii) Sub-Contracting Clause

49. The applicants first submission is that the sub-contracting clause requires an employer bound to the Provincial Bricklayers Agreement to sub-contract, not only work covered by the agreement, but any work encompassing the skills of members of the OPC, including tile and terrazzo work, to an employer bound to the Provincial Marble, Tile and Terrazzo Agreement. For the reasons set out below, I am not persuaded that the sub-contracting clause bears such an interpretation.

50. As indicated above, the sub-contracting clause appears within article 1 of the Provincial Bricklayers Agreement which provides in part as follows:

ARTICLE 1

Recognition and Sub-Contracting

(a) The Employer recognizes the Union as the exclusive bargaining agent for Bricklayers, Stonemasons and Plasterers, their respective Apprentices, Improvers and Working foremen in his employ in the Province of Ontario, in areas described in Appendix “B” hereto.

• • •

(c) Any Employer who is party to this Agreement desirous of contracting or sub-contracting any work encompassing the skills of members of the Ontario Provincial Conference shall only contract or sub-contract same to a contractor or sub-contractor who is bound by the Provincial Agreement with the Ontario Provincial Conference.

51. Article 1(c) requires an employer bound to the Provincial Bricklayers Agreement to sub-contract work to a contractor bound to “the Provincial Agreement with the Ontario Provincial Conference”. I do not accept that “the Provincial Agreement with the Ontario Provincial Conference” is a reference to both the Provincial Bricklayers Agreement and the Provincial Marble, Tile and Terrazzo Agreement depending upon the type of work being sub-contracted. The reference is to “the Provincial Agreement” in the singular. It is thus a reference to only one agreement. The clause appears within the Provincial Bricklayers Agreement which is entitled “Provincial Agreement for Ontario Bricklayers, Stonemasons and Plasterers”. Accordingly, it is my determination that the reference to “the Provincial Agreement” in article 1(c) is a reference to the Provincial Bricklayers Agreement. As a result, I do not

accept that the clause requires contractors bound to the Provincial Bricklayers Agreement to sub-contract work covered by the Provincial Marble, Tile and Terrazzo Agreement to a contractor bound by such agreement.

52. The applicants argue in the alternative that the words “any work encompassing the skills of members of the [OPC]” require contractors bound to the Provincial Bricklayers Agreement to sub-contract, not only bricklaying work, but also tile and terrazzo work, to a contractor bound to the Provincial Bricklayers Agreement. In my view, the words “any work encompassing the skills of members of the [OPC]”, when considered within the context of the Provincial Bricklayers Agreement, are a reference to the work of those employees covered by the terms of the agreement and do not include the work of tile and terrazzo employees.

53. The sub-contracting clause appears within article 1 of the agreement entitled “Recognition and Sub-Contracting”. Article 1(a) establishes that the employer has recognized the union as the bargaining agent for “Bricklayers, Stonemasons and Plasterers, their respective Apprentices, Improvers and Working foremen”. The union is not recognized as the bargaining agent for tile and terrazzo workers.

54. Given that the scope of the union’s bargaining rights are clearly defined in the agreement as limited to representing bricklayers, it is my determination that it would take much clearer language than “any work encompassing the skills of the members of the [OPC]” to place a restriction on the employer’s right to sub-contract work which is not covered by the collective agreement. In my view, these words do no more than limit the employer’s right to sub-contract work which would otherwise be covered by the terms of the agreement. The agreement does not apply to tile and terrazzo work, and accordingly the employer’s right to sub-contract such work is not restricted by the sub-contracting clause.

55. For the foregoing reasons, it is my determination that the responding parties are not bound to the Provincial Marble, Tile and Terrazzo Agreement, nor are they required by article 1 of the Provincial Bricklayers Agreement to sub-contract tile and terrazzo work to a contractor bound to either the Provincial Bricklayers Agreement or the Provincial Marble, Tile and Terrazzo Agreement.

56. The applicant is directed to advise the Registrar, no later than August 30, 1996, as to what issues remain outstanding and whether these matters are to be relisted for hearing.

57. I am not seized.

3658-95-U Dorington Smith, Applicant v. United Brotherhood of Carpenters and Joiners of America, Responding Party v. Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America, Intervenor

Construction Industry - Discharge - Interference with Local Trade Unions - Applicant alleging that he was removed from office of Business Representative of Carpenters’ union Local 27 by decision of International union taken without just cause contrary to Bill 80 amendments to the Act - Board finding that section 149(2) of the Act does not create rights to protect an individual except as necessary to protect the local union’s autonomy - Board dismissing application as no issue of local autonomy advanced before it

BEFORE: *M. A. Nairn*, Vice-Chair.

APPEARANCES: *A. M. Minsky* for the applicant; *David McKee* and *Tom Casey* for the responding party; *Jack J. Slaughter*, *Ucal Powell* and *Frank O'Reilly* for the intervenor.

DECISION OF THE BOARD; July 22, 1996

1. This is an application under section 149(2) of the *Labour Relations Act, 1995* (the "Act"). Section 149 of the Act, in its entirety, reads as follows:

149. (1) A parent trade union or a council of trade unions shall not, without just cause, assume supervision or control of or otherwise interfere with a local trade union directly or indirectly in such a way that the autonomy of the local trade union is affected.

(2) A parent trade union or a council of trade unions shall not, without just cause, remove from office, change the duties of an elected or appointed official of a local trade union or impose a penalty on such an official or on a member of a local trade union.

(3) On an application relating to this section, when deciding whether there is just cause, the Board shall consider the trade union constitution but is not bound by it and shall consider such other factors as it considers appropriate.

(4) If the Board determines that an action described in subsection (1) was taken with just cause, the Board may make such orders and give such directions as it considers appropriate, including orders respecting the continuation of supervision or control of the local trade union.

2. These provisions are of relatively recent legislative origin and this appears to be the first application relying on sub-section 149(2) which has proceeded to hearing. Much of the evidence was not seriously in dispute. The gist of the application is the allegation that the applicant was removed from the office of Business Representative of Local 27 of the Carpenters' union, by a decision of the International union taken without just cause. That decision determined that the applicant had failed to pay a fine within the time prescribed, and that as a consequence, he lost good standing in the union and was therefore ineligible to hold office in the union. I note that throughout this decision, the reference simply to the "union" is, for ease, a reference to that amalgamation of organizations including the responding party, the intervenor, and the Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America (the "District Council").

3. The responding party took the position that the Board has no jurisdiction in this matter. However, it was content to have the matter heard in its entirety rather than raising the issue as a preliminary matter, given it was a case of first impression. I therefore heard the parties' evidence and submissions on all issues. In light of the conclusion reached concerning the scope of section 149 of the Act I have summarized the events leading up to the application in less detail than covered by the evidence, but have included those facts in order to help inform the jurisdictional issue.

4. The applicant is a journeyman carpenter and has been a member of the United Brotherhood of Carpenters' and Joiners of America, Local 27 (or one of its predecessor locals) ("Local 27" or the "local") since 1978. As such, he is also a member of the responding party (the "parent union" or the "International"). In 1986, the applicant was elected to the positions of Vice-President and Business Representative of the local. In 1988, he was also elected Vice-President of the District Council. The applicant held these positions until September, 1995. Throughout this period the applicant has also been elected or appointed to various committees or to act in a representative capacity in union affairs.

5. In January, 1994, the applicant was charged, by Local 27, under the International's constitution, with having violated certain articles of that constitution. Those matters eventually went before a Trial Committee, selected by the District Council, in accordance with the provisions of the International constitution. A trial was held. On July 14, 1994, the Trial Committee informed the applicant of its

decision, finding him guilty of certain of the charges, and dismissing other charges. He was fined \$300.00 and suspended from holding all offices except that of Business Representative. The position of Business Representative, although elected, is a full-time paid position of the local, and at all material times constituted the applicant's gainful work.

6. The applicant appealed the decision of the Trial Committee, depositing \$50.00 in order to do so. The effect of commencing the appeal was to stay the decision of the Trial Committee. Under the constitution, that appeal is heard by the Appeals Committee of the International. The applicant received a decision of the Appeals Committee dated June 22, 1995 which everyone agreed was ambiguous. The District Council sought clarification of the ruling and advised the applicant that his position would remain "status quo" pending that clarification.

7. On August 1, 1995, the applicant received a letter from the General Secretary dated July 25, 1995, asking that he disregard the first decision of the Appeals Committee. A revised decision was enclosed, dated June 22, 1995. That decision concluded:

Accordingly, we sustain the penalty of \$300.00 less the \$50.00 already paid and the one year suspension from all offices except business agent.

8. At an Executive Board meeting of Local 27 on August 1, 1995 the applicant was informed that, pursuant to the Appeals Committee's decision he was being removed from the office of Vice-President of the local. On August 4, 1995 he was not allowed to attend a meeting of the Apprenticeship Committee. The applicant became aware that the view of the local and the District Council was that he was suspended from all offices or positions except Business Representative.

9. This included, for example, in addition to his appointment to the local's Apprenticeship Committee, his appointment to the National Apprenticeship and Training Advisory Committee. The applicant also learned this affected his position as delegate to the District Council and meant that he would not be able to attend the Carpenters' General Convention in September, 1995, although he had been elected as a delegate for Local 27. At a District Council meeting on August 10, 1995, he was told he could not attend because he was suspended. He sought clarification. The applicant was of the view that he was suspended from holding only constitutional offices. It was recommended to him that he seek clarification from the International General President as to which positions were affected by the ruling.

10. Under the constitution the General President has the authority and responsibility to interpret the constitution. On August 17, 1995 the applicant faxed a letter to Mr. Sigurd Lucassen, the General President, in Washington, D.C. asking for clarification of the verdict. On August 31, 1995 and prior to receiving an answer, the applicant contacted Mr. Lucassen by phone to inquire as to the status of his request.

11. There was some dispute in the evidence concerning this conversation and the content of earlier conversations between the two. It is clear that the applicant was aware of a thirty day time limit in which to pay the fine. It is also clear that the General President did not identify for the applicant when that thirty day period ran. The General President also understood that the applicant intended to pay the balance of the fine. As soon as his conversation with the General President was concluded on August 31, the applicant attended at the offices of the District Council and paid the \$250.00 balance of the fine.

12. On September 1 and 2, 1995, elections were held by Local 27. The applicant attended and voted. (There was no dispute as to his right to vote). In addition, he had been nominated for the position of Business Representative and his name was on the ballot. Regardless of any other confusion, all were

agreed that this position was not affected by the *verdict* against him. Sixteen candidates ran for the position. Six were to be elected. The applicant placed third. On September 5, 1995 the applicant attended a meeting of Local 27's Executive as newly-elected Business Representative.

13. By letter dated August 25, 1995 and received by the applicant early in September, the General President clarified the penalty. The letter supports, in part, the applicant's interpretation of the effect of the suspension imposed on him.

14. In the meantime, on September 2, 1995 the applicant received two letters from the local (identical in their content) dated August 30, 1995 informing him that he *was* no longer a member in good standing of the local and further advising him that failure to pay the balance of the fine within thirty days would result in the termination of his membership in the local.

15. Shortly after receiving the local's letter, the applicant received a letter from the District Council dated September 1, 1995, advising him that unless the balance of the fine was paid within thirty days, in accordance with the constitution, he *would* go out of good standing. This is the only communication received by the applicant that could be considered to constitute notice in writing of the time for payment of the fine and identifying what consequences would flow from a failure to pay within that time frame.

16. There was some dispute as to what the applicant understood from the letters. Ultimately it is of little consequence. Both letters are clear. Each, however, advises the applicant quite differently as to his status with the union. The applicant paid little attention to the letters as, in his view, the fine was paid and the matter closed in any event.

17. The applicant was due to be sworn into office at a meeting of the local on September 12, 1995. On September 8, 1995, Frank O'Reilly, writing as the local's recording secretary, wrote to the General President, requesting a ruling on whether or not the applicant had been eligible to run for office. The sequence of events that followed, and which led to this application, can be seen from a review of the correspondence between the various officials and the applicant. Mr. O'Reilly's letter provides in part:

A ruling is hereby requested on the status of Brother Dorington Smith in the election for Business Representative of Local 27. ... He failed to pay the balance of the fine within the constitutionally prescribed 30 day period, and on August 29th the District Council informed Local 27 that Brother Dorington Smith was out of good standing. On August 30th, Local 27 sent notice by registered mail to Brother Smith advising him that failure to pay the required outstanding fine within thirty days would result in his membership being terminated.

Elections for Business Representative were conducted on September 1st and 2nd, 1995. Brother Smith's name appeared on the pre-printed ballot. However, with Brother Dorington Smith not being in good standing he would not be eligible to be elected. A ruling on this matter is therefore requested. An early response is required as the Business Representatives are to be sworn in at the Local 27 meeting of Tuesday, September 12th.

I note that according to this letter the District Council told the local that the applicant was already out of good standing, yet the District Council advised the applicant quite differently in its September 1 letter to him.

18. The General President responded by fax dated September 11, 1995 as follows:

This is in answer to your letter of September 8, 1995 regarding the eligibility of member Dorington Smith under Section 31D of the UBC Constitution.

According to the information provided, Brother Smith failed to pay a fine within 30 days as required by the UBC Constitution. He has therefore lost "good standing", as stated in Section 45 O of the UBC Constitution.

Under Section 31D of the Constitution, a member who loses good standing after being nominated or elected to a position ceases to be eligible to run for or hold offices and positions covered by Section 31D. Brother Smith, therefore, was and is now ineligible, and he should not be installed. ...

19. In accordance with that advice, the local informed the applicant for the first time, publicly, at the meeting on September 12, 1995 that he was not to be installed as Business Representative as he was ineligible to run for office, having been out of good standing with the union. Both Mr. O'Reilly's and Mr. Lucassen's letters were read out at the meeting. The applicant was not installed. The net result of that action was that the applicant immediately lost the full-time paid position which he had successfully maintained through elections since 1986. In addition, he became ineligible to run for any other office or position in the union which required him to have maintained his membership in good standing for a continuous period.

20. The applicant did not see Mr. O'Reilly's letter until these proceedings were underway. Mr. Lucassen acknowledged that he did not seek any comments from the applicant before responding to Mr. O'Reilly's letter and making his decision; that he accepted the contents of that letter as fact. The applicant received a copy of Mr. Lucassen's letter in the mail a few days after September 12. It is the decision of the General President set out in paragraph 19 that the applicant challenges in this application. The local agrees that it accepted and acted on the advice of the General President in removing (or not installing) the applicant as Business Representative.

21. The applicant subsequently wrote to the General President asking that he reconsider his decision. That letter sets out the sequence of events from the applicant's point of view; includes his explanation for the time for payment of the fine, identifies section 45 of the constitution as relevant, and informs the General President of the letters received from the local and District Council. He sets out the personal consequences of the President's decision and reiterates that he was re-elected. The applicant acknowledges that he did not accurately recount the contents of the local's letter to him.

22. The General President responded by letter dated October 3, 1995, in part, as follows:

You have presented no justification for reconsidering that ruling.

As you were told previously, you were required by the UBC Constitution to pay the fine promptly, or else lose good standing. That obligation was not in any way delayed or postponed by your correspondence asking for clarification of the other portion of the penalty in your case, the suspension from office.

23. By letter dated October 17, 1995 the applicant sought to appeal to the General Executive Board of the International. Again, he set out at length his view of events, particularly with respect to the issue of notice, advising the International that he would seek a remedy before the Board if necessary.

24. The General Secretary of the International responded by letter dated November 13, 1995. Evidence and argument concerning the letter received from the International's General Secretary is ultimately of little, if any, assistance. It appears there is normally a further appeal available to the International's General Executive Board, except in matters regarding nominations and elections, where the decision of the General President is final.

25. I heard evidence and argument as to when the fine was properly due, which is not referred to here. Although in dispute, in the responding party's view the fine appears to have been due on August 24. However, the union acknowledged that some leeway might be given of a day or two, and that at

worst, the applicant was some six days late in paying the balance of the fine. Mr. Lucassen also testified that he has the authority to grant dispensation to members to allow late payment without penalty where, in his discretion, circumstances warrant. Examples of those kinds of circumstances generally involved the intervention of a third party or circumstances out of the control of the member which result in the member being unable to meet the strict time limit. Mr. Lucassen testified that he considered whether or not to grant such dispensation in this case as part of his reconsideration, but was of the view that there were no extenuating circumstances warranting such relief. He was of the view that the applicant was aware of the obligation to pay within thirty days and was the author of his own misfortune in failing to do so. He was also of the view that officers of the local were required to meet a high standard and set an example for the membership; that the applicant had fallen short.

26. It is the position of the applicant that he had thirty days from receipt of the letter on August 1, 1995 to pay the fine, and that he did in fact pay the fine on time. In the alternative, the applicant argues that he did not receive notice as to the time for payment as is required by the constitution and any late payment cannot be held against him. Finally, the applicant argues, even if he was late and bore the responsibility for that late payment, in the circumstances the Board ought to intervene because the responding party cannot show that it had just cause to remove him from office (or fail to swear him in) in the circumstances of this case.

27. There is no dispute that the International had nothing to do with the laying of the charges or with the trial proceedings. The Trial Committee makes a recommendation and the District Council decides what to do on the basis of that recommendation. It is the District Council that imposes the penalty. The Appeals Committee is a committee of the International. The applicant was aware that absent any pending appeal there was a thirty day time limit for payment. He knew that the consequence of not paying the fine was to lose good standing in the union with the attendant other effects. He was also of the view that the constitution required that written notice of that time period be provided indicating when the thirty days starts to run. Section 45(O) of the constitution provides:

All fines imposed and assessments legally levied including strike assessments, and working dues, dues checkoff, supplemental work dues or work fees duly established under Section 45C, shall be charged by the Financial Secretary to the member from whom due, and the member shall be notified in writing that same must be paid within thirty (30) days to entitle the member to any privilege, rights or donations. If the member does not make payment within the time prescribed the member shall not be in good standing and he or she shall be notified in writing by the Financial Secretary that unless the amount owing is paid within thirty (30) days thereafter his or her name shall be stricken from membership, except in case of a fine where an appeal is pending. Notices shall be sent to the last known address of the member as reported by the member to the Local Union. In cases of fines, assessments or such dues or fees owed to a District Council, notice to the member by the District Council shall satisfy the requirements of this Section.

[emphasis added]

28. Much of the evidence was directed at this issue of whether the applicant should be held to have been the author of his own misfortune and therefore bear the consequences. I only note that inherent in that issue is the issue of notice. In order to be held accountable, one must be clear as to the nature of one's obligations. The International has held the applicant responsible for late payment in the absence of any notice to him of the union's view as to when that amount was payable (in circumstances where the local and the District Council apparently held differing views as to the time for payment). Perhaps most telling is applicant counsel's comment in argument that it would be impossible to believe that the applicant would knowingly jeopardize his full-time paid position for \$250.00.

29. There can be no doubt that the consequences suffered by the applicant in respect of the late payment of the balance of the fine have been real and substantial, both financially and with respect to his standing in the eyes of the membership. The applicant engaged in inappropriate conduct for which

he was penalized. That penalty pales in comparison to the penalty he suffered for the late payment of the balance of the fine.

* * *

30. It is the position of the responding party that the Board has no jurisdiction to deal with the matters raised by this application. Counsel argues that prior to the passage of Bill 80 the Board had no jurisdiction to deal with internal union affairs. To the extent that Bill 80 gave jurisdiction to the Board it was to review the relationship between a parent and its local unions, and does not go beyond that. It argues that the legislation's intent was to protect local union autonomy from inappropriate control by the parent. The International also argues that even if the words used in the statute are sufficiently "elastic" to evoke the interpretation pressed by the applicant, the Board should not become the "Court of Appeal" over every internal union decision.

31. The International accepts that the introduction of Bill 80 changed the Board's role. It argues however that the amendments were never intended to carry the Board into the realm contemplated by the applicant in this case. Rather, they were intended as a mechanism for maintaining local union autonomy in the face of unwarranted interference from the parent union. The responding party relied on the amendments as they were first introduced and were subsequently amended in committee or in passage. It argues that the amendments were introduced as a package of five interrelated sections designed to establish a standard of conduct required before a parent could interfere with a local union's autonomy.

32. On behalf of the applicant, counsel argues that the responding party fails to address the actual words found in sub-section 149(2). He notes that this section is not limited to actions of the parent but includes actions of a council. He agrees the overall context of Bill 80 was to deal with parent or council disputes with local unions but, rightly or wrongly, the language of sub-section 149(2) is not qualified or modified in any way. He asserts that the sub-section has created unqualified protection for members and officers not to be removed or penalized regardless of any dispute between parent and local. He argues that the responding party's argument amounts to reading down the section because of a context it asserts ought to prevail; the effect of which is to amend the legislation.

33. Both parties referred to the decision of the Board in *International Brotherhood of Electrical Workers*, [1996] OLRB Rep. Feb. 70 particularly paragraphs 82, 89, and 90:

82. Consequently, we reject the suggestion that under section 147, the Board should continue to avoid reviewing internal trade union matters. It is apparent that all of Bill 80, including section 147, evidences a legislative intent that the Board exercise a supervisory jurisdiction over internal trade union affairs which the Board did not previously have. It is also apparent that section 147 *requires* the Board to review and adjudicate upon internal union matters when they concern an alteration of a local trade union's jurisdiction by its parent trade union. ...

89. The nature of section 147 and the factors which the Board is directed to consider under it requires that the Board not limit itself to an examination of the parent union's conduct in the decision-making process, and the factors which it considered. It may be that a parent union can do everything wrong in that respect and still end up with a decision which is fair and reasonable in the circumstances. That is, the question is not: "Could a parent trade union, acting honestly and looking at the situation and circumstances as a whole, and weighing the interests of all concerned, have reached the conclusion and made the jurisdictional decision it did?" Instead, the question is: "Having regard to the evidence before the Board, does that parent union's decision yield a result which is fair and reasonable."

90. In a proceeding under section 147 the Board is limited to considering the four factors listed in subsection 147(3). The wording of section 147 taken as a whole also suggests that the Board's power is limited to determining whether there was just cause for the alteration of jurisdiction under

scrutiny. The wording of the provisions stands in sharp contrast to that of subsections 149(3) and (4) (also part of Bill 80) which also require the Board to decide whether a parent trade union had just cause to interfere with the autonomy of a local trade union, or for removing local union officials from office, or changing their duties, but allows the Board to “consider such factors as it considers to be appropriate”, and allows the Board to make whatever orders or directions it considers appropriate.

That decision deals with section 147 of the Act and does not address the extent of the application of section 149.

34. The Board has repeatedly and consistently held that it is not a watchdog over the internal affairs of a union. (see for example *Frank Manoni*, [1981] OLRB Rep. Dec. 1775; *Michael Connolly*, [1987] OLRB Rep. Feb. 193). To the extent that the Board has seen fit to review or consider internal affairs it has been in the context of what are now sections 74 and 75 of the Act, but only as that conduct may inform the issues addressed by the statutory provisions; that is, particulars of conduct concerning representation or referral matters that are alleged to be arbitrary, discriminatory or in bad faith. In addition the Board has reviewed internal union conduct in certain limited circumstances of allegations of intimidation and coercion (see *Frank Manoni*, *supra.*).

35. The *Labour Relations Amendment Act, 1993* (“Bill 80”) received Royal Assent on December 14, 1993. That statute added what are now sections 145 to 150 to the Act. That was the extent of its provisions. The provisions deal exclusively with the construction industry and have no application to trade unions operating outside the construction industry. The provisions need to be read in the context of the construction industry provisions of the Act, which recognize the relationships that exist between parent, council, and local unions in that industry, and which provide, most notably, for province-wide bargaining structures and the necessary representative parties. There are however few, if any, other guides to interpreting these provisions except the language of Bill 80 itself.

36. Section 145 is definitional. A “local trade union” is defined as one that is affiliated with, subordinate to, or directly related to the parent trade union, and includes a council of trade unions. A “parent trade union” is defined as a provincial, national, or international union which has at least one affiliated local union subordinate or related to it. “Jurisdiction” is defined to include geographic, sectorial and work jurisdictions. A “council of trade unions” is not defined by section 145.

37. Section 146 applies to employees in bargaining units in other than the ICI sector and acts to create bargaining rights for local unions where they did not exist before. The section contemplates that those rights would exist together with the rights held by the parent. Providing the local with such bargaining rights seems designed to give a local trade union, relative to its parent union, a greater or equal voice within its jurisdiction to direct its affairs in relation to bargaining. However, the section recognizes that where bargaining rights co-exist there is also opportunity for dispute. While the scope of sub-sections 146(2) and (3) may as yet be undetermined, sub-sections 146(4) and (5) provide a mechanism for resolving a dispute concerning collective bargaining. Sub-section 146(4) gives the Minister the power to require that a parent and a local union form a council of trade unions for collective bargaining purposes. The exercise of the Minister’s discretion is premised on sub-section 146(4)(b) which provides:

146. (4) The Minister may, upon such conditions as the Minister considers appropriate, require a parent trade union and its local trade unions to form a council of trade unions for the purpose of conducting bargaining and concluding a collective agreement,

• • •

(b) if the Minister considers that doing so is necessary to resolve a disagreement

between a parent trade union and a local trade union concerning conducting bargaining or concluding a collective agreement.

38. That sub-section contemplates the intervention of the Minister only where it is necessary to resolve a dispute in the trade between the parent and a local concerning bargaining or concluding a collective agreement.

39. Section 147 deals with what the responding party asserted was the “heart” of Bill 80. It prohibits a parent union from altering the jurisdiction of a local trade union except with just cause. Bill 80 initially proposed that the local union’s consent would be required before a parent could change jurisdiction; a proposal that would have provided substantial control to the local. That standard was changed in the legislative process to a standard allowing an international to alter jurisdiction so long as it has just cause to do so. The section clearly gives the Board a supervisory authority over changes made in jurisdiction by a parent affecting a local union, and has been considered in *International Brotherhood of Electrical Workers, supra*.

40. Section 148 clarifies the extent of rights given to a local union in sections 146 or 147. Section 150 identifies different circumstances in which a local union is entitled to appoint trustees to administer multi-party benefit plans. The responding party argues that the thrust of the amendments did not change throughout the legislative process; they were, and continue to be directed to the regulation of affairs between a parent and local union.

41. Sub-section 149(1), in like manner to sub-section 147(1), creates a prohibition against certain conduct by a parent union. The parent is prohibited from assuming supervision or control of the local union, or otherwise interfering with the local union in such a way that the autonomy of the local union is affected, except with just cause. The usual method of supervision or control is the imposition of a trusteeship, a matter contemplated by many constitutions of parent unions and a matter over which the Board has had some limited supervisory role in the past (see section 89 of the Act). The sub-section clearly deals with broader kinds of conduct on the part of the parent and gives the Board a broader supervisory authority over that conduct than has been the case in the past. Like sub-section 147(1) the standard of review of the parent’s conduct is one of just cause.

42. The applicant argues that sub-section 149(2) creates a right that is independent of sub-section 149(1). The responding party argues that sub-section 149(2) must be read as explaining the kinds of conduct prohibited by sub-section 149(1); that it creates no right independently of sub-section 149(1).

43. The legislative history of Bill 80 is of little assistance. Section 138.5 (which became section 149) initially made no reference to “members” in sub-section 138.5(2) and only acted to protect local union officials. Sub-section 138.5(4) established what is commonly referred to as a “justice and dignity” clause; that is, the official would continue to receive their wages until the Board determined the matter. The reference to “members” appears in the second reading version of Bill 80 and sub-section 138.5(4) referred to above is deleted. These changes could arguably be interpreted to support either position taken before me. There was also an amendment in sub-section 138.5(3) concerning the appropriate reference to a union’s constitution in deciding issues under the section as a whole. The bill then passed in that form.

44. Read in isolation, the words in sub-section 149(2) arguably support the applicant’s contention. However the prohibition created by those words would be considerably broader than any prohibition found elsewhere in Bill 80. To appreciate the effect it must be recognized that virtually every constitution of a parent union in the construction industry provides some kind of appeal mechanism from actions taken by the local union or a council of unions. Those appeals are heard by the parent and

become decisions of the parent. The language of the sub-section is extremely broad and includes not just actions of the parent against officials of the local, but includes, "a penalty....on a member of a local trade union."

45. The interpretation asserted by the applicant would give the Board jurisdiction to review any decision taken by a parent union or a council of unions where it was alleged it imposed a penalty on a member of the local union without just cause, whether or not the action or conduct was initiated by the parent or the council. It would place the Board in the position of arbiter of virtually every action taken against a member by the *local* union, so long as it was appealed to the parent. That appellate decision would be subject to scrutiny by the Board. The kinds of issues could include matters ranging from fines or suspensions for late payment of dues, the issuing of travel or clearance cards, to discipline imposed on members for crossing a picket line. These are issues that have historically been dealt with internally through the unions' own appeal procedures and through the courts, if necessary, as matters arising under the bylaws and constitution of the union. There is nothing to suggest that that final forum and any usual remedies do not continue to be available, even in this case. The Board has had no role in these kinds of internal union disputes. In large part these matters also arise completely independently of any issue of retaining local autonomy in the face of action by the parent union.

46. I note that the term "penalty" is much broader than, for example the term "discipline". If a member is denied a travel card or a clearance card for example, and that denial is confirmed by a council or parent, it would not be difficult for the member to argue that such denial constituted a penalty, in that it could adversely affect the member's work opportunities. On the applicant's view of sub-section 149(2) the member could complain to the Board and have the decision assessed on a standard of just cause.

47. In like fashion, a member could take issue with the local's application of the hiring hall rules. If the member charged the local Business Representative, and the Business Representative's decision was upheld by a decision of the council or the parent, would not the member be able to complain that he had been penalized by that decision in that his work opportunities had been adversely affected? The effect on one's work opportunities would likely be more direct or more obvious where the operation of the hiring hall was in issue compared to the issuing of a travel or clearance card. Yet section 75 already speaks to hiring hall issues. If sub-section 149(2) is as broad as the applicant asserts, surely a member could assert his preference to have the hiring hall decision assessed on the arguably broader standard of just cause rather than the standard set by section 75. It is not reasonable to interpret sub-section 149(2) in a manner that could create overlapping protections within the Act utilizing different standards of review.

48. The sub-section also refers to actions of both a parent and a council of trade unions. The applicant's argument, carried to its logical end, would mean that a member would have the right to challenge a decision taken by a council of trade unions and have that matter dealt with by the Board. In addition, the member could, under the union's constitution, pursue an appeal to the parent on the same issue. That decision could also then be subject to scrutiny by the Board. The facts in this case provide a case in point. The local union laid the original charges against the applicant. The District Council imposed the penalty. That decision of the District Council was appealed to the Appeals Committee of the International. On the applicant's argument, the Board would have jurisdiction to review the District Council's decision *and* the decision of the Appeals Committee. This interpretation of the legislation is impractical, and if not unworkable, certainly extremely cumbersome, both in terms of resources and potential results. It would also act to inject the Board's supervision into virtually every aspect of union affairs.

49. I would note too, that such rights would only have been created for members of trade unions in the construction industry. The provision has no application outside that industry. Members of trade unions operating outside the construction industry would have the same rights as currently exist; to pursue a dispute concerning a penalty imposed on them in accordance with the terms of the union's by-laws and constitution, subject to the supervisory authority of the courts. No reason was advanced as to why members of construction unions should be singled out and provided with such extensive statutory protection from the Board.

50. It is arguable that the sub-section was intended to provide greater protection to members of construction unions because of the realities of work in that industry. Construction unions have a greater role and control over the distribution of work opportunities through both the fact of union membership and the operation of the hiring hall. As noted, section 75 of the Act provides certain protection against unwarranted actions of a union in respect of the hiring hall. Yet to the extent that one might seek to protect against other actions of the union which inappropriately affect union membership (and therefore work opportunities), one might reasonably expect clearer, and more specific, legislative direction. Such an intention is not clear from the language, particularly where that original and much more extensive individual protection is being asserted as part of a series of amendments that as a whole are specifically directed at issues of local union autonomy.

51. What then does one make of sub-section 149(2)? In my view it acts to identify or clarify the kinds of indirect conduct that are prohibited by sub-section 149(1). Sub-section 149(1) expressly prohibits "indirect" interference. Read with sub-section 149(1), sub-section 149(2) confirms that, for example, a parent union cannot effectively assume control of a local union by removing local officers or elected local officials and replacing them with individuals sympathetic to the parent's intentions. Nor could it act to penalize members in an attempt to intimidate them from challenging the parent's supervision. It is arguable that sub-section 149(2) is not necessary clarification and therefore its existence must mean something else. However, I am not persuaded that such an interpretation is consistent with the overall thrust of Bill 80. Section 149(1) speaks to issues of local autonomy, as do each of the other sections in some way.

52. Sub-section 149(2) also appears to give an opportunity to *individuals* (whether local officers or members) to *initiate* a complaint, challenging the parent's or council's action, independently of the right of the local union to also complain, even though matters of local autonomy are still the essence of the alleged problem. It makes some sense to provide, in essence, corollary protection in sub-section 149(2).

53. The applicant argued that the reference to council of trade unions in section 149 was reason to conclude that the scope of the section was broader than protecting local autonomy from unwarranted interference by the parent. To an extent, I accept that argument. As noted, council of trade unions is not separately defined in section 145. The definition of local trade union includes a council, and appears to recognize that, in relation to a parent union, a council of trade unions may be affiliated with, subordinate to, or related to the parent; that is, there may be issues of protecting the autonomy of a council from a parent union. However, the prohibition in section 149 is directed at conduct of either a parent or a council. That appears to recognize that there may be circumstances where a local trade union is subordinate to a council of trade unions and extends the protection of local autonomy accordingly. That relationship is recognized in the definition of "council of trade unions" in section 126 of the Act. In addition, section 146 contemplates the creation of a council of trade unions for bargaining purposes. The precise scope, relationship and interaction of these provisions remain to be determined.

54. Sub-section 149(1) is directed at conduct of a parent trade union or council of trade unions that affects the autonomy of the local trade union and which is conduct without just cause. On balance,

I am persuaded that sub-section 149(2) does not create rights to protect an individual except as is necessary to protect the local union's autonomy. While there may well be situations where it is difficult to distinguish between issues of a member's individual rights and issues of local autonomy, no issue of local autonomy was advanced in this case. The issue was an internal union matter affecting an individual member. Regardless of my view of the actions of the General President in the circumstances, the Act does not give the Board the authority to enter into this inquiry. The application is therefore dismissed.

3523-95-R Stephen R. Gerber, Applicant v. International Brotherhood of Electrical Workers, Local 353, Responding Party v. **Edwards, A Unit of General Signal**, Intervenor

Termination - Reconsideration - Representation Vote - Board earlier ruling disputed ballot in representation vote to be spoiled because it did not unequivocally indicate the voter's choice - Applicant and employer seeking reconsideration on ground that Board denied them opportunity to make submissions on two unreported Board decisions cited by Board in its earlier decision - Applicant and employer also asserting that Board's decision raising significant and important issues of Board policy, particularly since passage of Bill 7 - Applications for reconsideration dismissed

BEFORE: *Pamela Chapman*, Vice-Chair, and Board Members *R. W. Pirrie* and *H. Peacock*.

DECISION OF THE BOARD; August 21, 1996

1. By letter dated February 6, 1996, the applicant ("Gerber") has requested that the Board reconsider its decision dated February 1, 1996. The applicant is joined in that request by the intervenor employer ("the employer"), which filed a Request for Reconsideration on February 14, 1996.

2. Pursuant to section 114(1) of the *Labour Relations Act, 1995* the Board has the discretion to reconsider any decision it has made. Section 114(1) states:

114. (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

3. The principles which the Board applies in an application for reconsideration have been detailed in numerous decisions, including *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185 and *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096. Generally, the Board has said that it will not reconsider its decisions unless a party proposes to adduce new evidence which would be practically conclusive of the matter, which could not previously have been obtained through the exercise of due diligence, or a party desires to make representations not previously considered by the Board which it had no prior opportunity to raise. The Board may also reconsider a decision if the request raises significant and important issues of Board policy not considered in the decision.

4. At the request of the Board, the responding party ("the union") responded to the request for reconsideration by letter dated February 28, 1996. On March 7, 1996, counsel for the applicant filed a letter commenting on the union's submissions. Finally, on July 3, 1996, counsel for the union wrote to the Board enclosing a further case in support of its submissions.

5. In reaching our decision in this matter we have carefully considered all of the submissions made by the parties with respect to the request for reconsideration.

6. The applicant and the employer have raised two grounds for reconsideration of the Board's decision.

7. First, they complain that the Board did not give the parties an opportunity to make submissions on two unreported Board decisions cited in the decision of February 1, 1996: *Maidstone Manufacturing Inc.*, unreported decision dated December 19, 1994, Board File 1097-94-R; request for reconsideration denied January 24, 1995; application for judicial review dismissed March 23, 1995, [1995] OLRB Rep. Mar. 388; and, *Ian Martin Limited*, unreported decision dated March 23, 1994, Board File 2705-93-R.

8. It is clear from a review of the decision of February 1, 1996, that the Board referred to these two cases as recent support in the Board's jurisprudence for the principle that a ballot may only be counted where it clearly and unequivocally, on its face, indicates the choice of the voter. This principle was articulated in an earlier decision of the Board, *Fruehauf Trailer Company of Canada Limited*, [1974] OLRB Rep. April 254, which was also cited in our decision.

9. The *Fruehauf* decision was cited by the responding party union in its written submissions to the Board filed January 22, 1996, in which the union clearly relied upon the principle discussed above. Furthermore, all three parties made argument about whether or not the ballot in question clearly indicated the intent of the voter despite the markings in both circles. Indeed, counsel for the intervenor employer, in written submissions dated January 15, 1996, made the following comment:

The Board has on numerous occasions dealt with the issue of spoiled ballots and it is submitted that the caselaw may be properly summarized as indicating that a ballot shall be counted so long as it does not identify the identity of the voter (which is not an issue in this case) and, further, *where there is a clear indication on the face of the ballot of the choice of the voter.* (emphasis added)

10. Thus, it is clear that the parties expected the Board to apply this principle to the facts of this case in reaching its decision, and had a full opportunity to comment on the way in which we ought to do so. The parties disagreed, however, on whether or not the ballot in question clearly expresses the intent of the voter.

11. The intervenor employer claims that the Board erred in law by failing to allow the parties to make submissions on the cases cited above, relying on the decision in *Re Lawrence's Will Trust* [1972] 1 Ch. 418 at 437. However, the court in this decision does not conclude that a court or tribunal must always seek the submissions of the parties on any authority cited by it in a decision. Rather, the court makes the following distinctions:

... In the course of this judgment I have referred to certain authorities that were not cited in argument. A judge who, after reserving judgment, comes upon possibly relevant authorities not cited in argument is in a position of some difficulty. Naturally he wishes to avoid the expense and delay of restoring the case for further argument; yet the paramount consideration is that of avoiding any injustice to litigants or their counsel. It seems to me that a distinction can be made. If the authorities are such as to raise a new point, or to change or modify, even provisionally, the conclusion that the judge has already reached, or to resolve his doubts on a point, I can see no alternative to restoring the case for further argument; and, of course, authorities do not always wear the same aspect after they have been dissected in argument as they appear to wear before. On the other hand, if the authorities do no more than confirm or support the conclusions that the judge has already reached on a point that has been fairly argued, then in most cases I cannot see that it is wrong for the judgment to refer to them without any further argument. A litigant to whom the authorities are adverse would have been defeated in any event, and a litigant whose cause the authorities support is not likely to object to the advent of reinforcements. Further, if an appeal is

contemplated, or if the case is reported, the citation of the additional authorities may be of assistance in showing that they were not overlooked and in preventing them from being overlooked in the future. Similarly, I do not think that objection could fairly be taken to the citation of an authority which could not affect the result but merely, for example, provides an apt phrase or extraneous parallel. ...

12. This proposition has been echoed by the Federal Court of Appeal in an application for judicial review cited by the responding party union, *Re Borghi et al and Canada Employment and Immigration Commission*, (1996) 133 D.L.R. (4th) 542 at 549 to 550:

... Counsel for the appellant suggested that the umpire violated a principle of natural justice by relying on the *Fera* decision, which was not discussed at the hearing. Since an opportunity to address the decision was not given, it is said that this procedure was improper. In support of this argument, the following words of Gonthier J. from *Consolidated-Bathurst Packing Ltd. v. International Woodworkers of America, Local 2-69* (1990), 68 D.L.R. (4th) 524, at p. 565, [1990] 1 S.C.R., 42 Admin. L.R. 1 were quoted:

I agree with Cory J. A. (as he then was) that the parties must be informed of any new ground on which they have not made any representations. In such a case, the parties must be given a reasonable opportunity to respond and the calling of a supplementary hearing may be appropriate.

The principle stated by Gonthier J. is well- established in the jurisprudence. It is, however, not applicable to this case. Strictly speaking, *Fera* did not contain a “new ground” on which the parties had not made representations. *Fera* was a decision that was relevant to the arguments presented by counsel, but it did not deal with a “new ground”. Courts are not bound to consider only those authorities submitted by counsel. If they were, their hands would be unduly tied, especially where counsel failed to cite relevant authorities. Courts often are aware of or become aware of authorities that counsel do not cite. There is nothing to prevent them from using the fruits of their judicial research, at least as long as no altogether new ground is raised, which would make it unfair to decide the case without giving counsel an opportunity to react to it.

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13. As noted above, the Board referred to *Maidstone* and to *Ian Martin* as recent confirmation of the Board’s approach to spoiled ballots, on a point which was argued by all parties. Certainly the Board did not suggest that the facts in *Maidstone* were identical to those in the present case, or that we were bound by the Board’s decision in the earlier case. And most importantly, our decision in the present case rests not on our accepting one party’s legal arguments over another’s (indeed, all parties appeared to agree on the law), but rather on a factual finding made after review of the ballot in question. It simply cannot be said, therefore, that there was any obligation on the Board to seek further submissions on these cases prior to reaching our decision.

14. In any event, even if we were to consider the submissions concerning the *Maidstone* and *Ian Martin* decisions made by the applicant and the intervenor in their requests for reconsideration, on the basis that they had no earlier opportunity to make them, this would not lead us to alter our previous decision. Both the applicant and the intervenor basically repeat their earlier submissions concerning the interpretation which should be placed by the Board on the marks made by the voter on the ballot which we have found to have been spoiled, arguing that these marks in fact do reveal a clear intent to vote “NO”, even if the marks on the ballot in the *Maidstone* case were found not to be clear. Certainly the marks on the ballot in the present case are not the same as the marks considered by the Board in the *Maidstone* case. Nonetheless, we have concluded that the presence of the marks in the two circles would require us to engage in speculation as to the intent of the voter in making the marks, in order to establish whether or not the ballot was a “YES” or a “NO” vote, or whether the voter intended to spoil his or her ballot. In these circumstances, we were and we remain satisfied that the appropriate recourse is to mark the ballot as spoiled.

15. The second ground relied upon by the applicant and the intervenor in their requests for reconsideration is that our decision raises significant and important issues of Board policy.

16. The applicant argues that our decision is an unjustified departure from previous Board jurisprudence. As reviewed above, and in our earlier decision, we have, in reaching our decision, applied the principle that a ballot must disclose the clear intent of the voter in order to be counted. As there was no argument by any party that this was not the appropriate principle to be applied, and indeed no cases were cited by the applicant or the intervenor, we cannot agree that the decision of February 1, 1996 is a departure from the Board's approach to spoiled ballots in earlier cases.

17. Both the applicant and the intervenor also note that this decision was made since the passage of the *Labour Relations Act, 1995* ("Bill 7"), in support of their position that the ballot in question should have been counted, and presumably to demonstrate that the decision raises important policy concerns. Certainly it is true, as noted in both requests for reconsideration, that Bill 7 places increased emphasis on secret ballots as the method for determining employee wishes concerning representation by a trade union. However, this new emphasis, and thus the greatly increased number of votes now conducted by the Board, only confirms the need for consistent and objective, and also easily administered, standards in the Board's approach to spoiled ballots. The approach taken in this case, and in the others reviewed in our decision, ensures objectivity by avoiding the need for subjective interpretation of a voter's intention, which is a particularly troubling prospect when it occurs after the results of the vote are known. We are satisfied that this approach is more likely to protect the "integrity" (the word used in the employer's submissions) of the Board's role in the conducting of votes than would having the Board engage in the type of analysis urged upon us by the applicant and intervenor in this case.

18. For all of these reasons, the requests for reconsideration are denied.

0616-96-U; 0617-96-OH David Gazit, Applicant v. Ontario Public Service Employees Union, Responding Party v. George Brown College, Intervenor; David Gazit, Applicant v. George Brown College, Responding Party

Colleges Collective Bargaining Act - Discharge - Duty of Fair Representation - Health and Safety - Practice and Procedure - Unfair Labour Practice - Applicant complaining about union's handling of various grievances and about conduct of College alleged to have caused stress and to constitute workplace hazard- Board exercising its discretion not to inquire into complaint under Colleges Collective Bargaining Act because of delay and because no labour relations purpose would be served by the inquiry - Application under Occupational Health and Safety Act (OHSA), except for issue of separation from employment, dismissed for delay - Application under OHSA dealing with termination stayed by Board pending outcome of complaints filed by applicant with Human Rights Commission

BEFORE: *M. A. Nairn*, Vice-Chair.

APPEARANCES: *Harry Kopyto* and *David Gazit* for the applicant; *Gavin Leeb* and *George Richards* for the Ontario Public Service Employees Union; *S. C. Raymond*, *Regina Lapworthy*, *John Hardy* and *Cindy-Ann Thomas* for George Brown College.

DECISION OF THE BOARD; August 19, 1996

1. Board File No. 0616-96-U is an application under section 96 of the *Labour Relations Act, 1995* (the "Act") alleging that the Ontario Public Service Employees Union ("OPSEU" or the "union") has violated section 76 of the *Colleges Collective Bargaining Act* ("CCBA") (the "section 96 complaint"). That section is substantially the same as section 74 of the Act and deals with what is referred to as a union's duty of fair representation. Board File No. 0617-96-OH is a complaint under the *Occupational Health and Safety Act* ("OHSA") alleging that George Brown College (the "College" or the "employer") has violated section 50(1) by disciplining and otherwise penalizing Mr. Gazit in violation of that Act (the "OHSA complaint").

2. The matters came on for hearing and the employer and OPSEU raised certain preliminary objections. I heard the evidence and representations of the parties on those issues and this decision deals only with the three preliminary matters raised. George Brown and OPSEU took the position that (1) the Board has no jurisdiction to deal with the OHSA complaint; (2) that, even assuming such jurisdiction, the Board should stay both matters as Mr. Gazit has outstanding complaints against both OPSEU and the employer before the Human Rights Commission concerning the same subject matter; and (3) the Board ought to exercise its discretion not to inquire into much of both complaints because of the unreasonable delay in bringing the complaints. This latter objection to the Board's proceeding incorporated an argument that certain matters raised were now moot and ought not to be pursued on that ground as well.

3. A considerable amount of documentary material was filed on the agreement of the parties. Other facts were agreed to. In addition, I heard evidence from Mr. Gazit with respect to his reasons for delay in bringing the applications. Both complaints arise out of the same set of circumstances; Mr. Gazit's alleged treatment by the College while employed as a clerk at the circulation desk of the College's library and the union's alleged response to that treatment. Mr. Gazit has also filed four human rights complaints; two against the College (dated June 28, 1995 and June 25, 1996) and two against OPSEU (dated February, 1996 and June 25, 1996); which complaints rely on the same allegations of misconduct.

4. In the section 96 complaint Mr. Gazit asserts that OPSEU has not acted in accordance with its statutory obligation in the handling of his grievances. The complaint details allegations going back to 1992. At the hearing, Mr. Gazit's representative made it clear that Mr. Gazit was seeking to have the Board order four grievances to arbitration. Earlier grievances are therefore not in issue, although Mr. Gazit would assert that the union's conduct in respect of those matters is indicative of its general treatment of him. Notwithstanding that issue, it is apparent that the remedy being sought is with respect to four grievances. Those were identified as follows:

- (1) a grievance dated January 11, 1994 concerning an alleged unreasonable exercise of the employer's discretion in not removing a letter of discipline dated March 16, 1992 from Mr. Gazit's file;
- (2) a grievance dated January 20, 1994 concerning the employer's refusal to destroy the psychiatric report obtained in 1993;
- (3) a grievance dated November 24, 1994 alleging harassment of Mr. Gazit by a supervisor, Mr. Hardy;
- (4) a grievance dated August 9, 1995 concerning a memo dated July 21, 1995 to Mr. Gazit from Mr. Hardy.

5. It is the position of OPSEU and the College that the first three grievances have been settled and that the fourth grievance was never referred to arbitration and that it is too late now for Mr. Gazit

to complain about that matter. The parties are agreed that a fifth grievance, dated May 5, 1995, concerning the appropriate classification of Mr. Gazit's position, remains outstanding.

6. The OHSA complaint asserts that Mr. Gazit encountered a number of difficulties in performing his job as circulation clerk from the outset of his employment. Those difficulties are described in his application as including:

- (a) The Management of George Brown failed to provide him with necessary assistance to adequately perform his duties as a clerk at the circulation desk;
- (b) the management of George Brown College failed to respond to legitimate complaints which he made to it regarding negative comments about the sexual orientation and marital status of persons working in the library including statements that the problem of one employee was that "she is not married" and mocking the sexual orientation of another employee as well as sexist comments such as the use of expletive "bitch" by one employee at a female student;
- (c) management permitted the Applicant to be given unfair, unreasonable and unfounded performance reviews and permitted those performance reviews to remain on the Applicant's personal file notwithstanding his protestations that they were unfair and biased;
- (d) management continually ignored requests by the Applicant that fellow employees be restrained from making malicious and unfounded derogatory comments regarding the manner in which the Applicant was performing his work as a clerk at the circulation desk of the library;
- (e) management failed to respond to complaints made by the Applicant regarding disparaging comments about the Applicant's age (he was 50 years old at the time that he commenced working for the Respondent) and regarding his taking time off during the Jewish high holidays.

7. Mr. Gazit's complaint is that this conduct on the part of the College caused him stress and anxiety and he asserts that management's conduct as described constituted a workplace hazard under the OHSA. He further states that in reporting the incidents and their effect on his health and safety he was exercising protected rights under the OHSA. He asserts that by failing to take corrective measures the College was in breach of its duty under the OHSA to take all reasonable steps to protect the health and safety of a worker. Finally, he asserts that as a result of making complaints, the College has engaged in acts of reprisal against him, which included:

- (a) management consciously and intentionally ignored the aforesaid conditions knowing that their ongoing maintenance would continue to aggravate the Applicant's state of health, isolate him from those who were the objects of some of his criticism and make it more stressful and difficult for him to perform his services adequately for the College;
- (b) without limiting the generality of the foregoing, management of George Brown refused to hire additional staff to support circulation desk duties even though the work should more appropriately have been done by two full-time clerks;
- (c) failing to ensure that the Applicant received the backup support from the library technicians employed in the library at appropriate times to assist as the demand dictated;
- (d) refusing to reduce the Applicant's workload or job functions by transferring functions elsewhere. In fact, the College with the knowledge and under the direction of Hardy deliberately intensified the Applicant's workload in reprisal;
- (e) moreover, while agreeing to provide assistance in the borrower registration and the production of library cards during peak intake periods, Hardy failed to enforce such an agreement;

- (f) in response to requests for transfer of job functions, Hardy on behalf of management, redefined those jobs that the Applicant sought to have transferred as the exclusive responsibility of the Applicant thereby minimizing the already marginal assistance which the Applicant had and increasing his workload;
- (g) Hardy repeatedly made unjustified, negative allegations regarding the Applicant's job performance, behaviour and attitude including wrongly suggesting that he did not manage his time properly after his initial complaints regarding his working conditions;
- (h) library technicians and others working in the library soon became aware of Management's failure to respond to the Applicant's complaints and concerns. Management knew of this and therefore greatly reinforced the refusal of the rest of the staff to cooperate with and assist the Applicant in performing his duties as and when required. This resulted in his total ostracization, rendering him isolated and vulnerable to the stress induced by the conduct that was the subject matter of his complaints;
- (i) vindictively characterized the Applicant as an intimidating and threatening person capable of violent behaviour without reasonable cause for so doing and causing a memorandum dated March 16, 1992 to be placed in the Applicant's personnel file to further intimidate him from efforts to protect himself from an unhealthy and unsafe, poisoned work environment;
- (j) Management tolerated and encouraged technicians to carry out personal attacks and badgering of the Applicant to cause him pain, stress and humiliation with the ultimate goal of carrying out sufficient retaliation and intimidation to make him resign his position. This was done through ostracization, taunts, nasty pranks, contemptuous laughing, sneering, malicious gossip, banging his desk and unreasonable scrutiny of his behaviour and job performance. Such attempts to make his work life miserable was incessant; this behaviour occurred in one form or another day in and day out; week after week, for most of his 6 years of employment.

8. In its response to the OHSA complaint, the College asserts that as a result of certain actions and artwork of Mr. Gazit, it was of the view that it was necessary to obtain a psychiatric assessment to alleviate its concern about potential violent conduct, that Mr. Gazit agreed to undergo an assessment, and that subsequently, the College has attempted to respond, within its resources, to Mr. Gazit's various job-related concerns. It asserts that Mr. Gazit was provided a transfer, was given fair and objective performance reviews, and that he was laid-off in March 1996 as part of College-wide budgetary cut-backs.

9. The first fourteen paragraphs of particulars are identical in both complaints. The section 96 complaint goes on to allege that OPSEU either colluded with the College or failed to properly represent Mr. Gazit with respect to the issues raised.

10. In the OHSA complaint, Mr. Gazit seeks "all the relief requested in the grievances filed by him ...". Mr. Gazit's representative confirmed that he was seeking remedial relief from the Board in the OHSA complaint that the Board would not order in the section 96 complaint. He acknowledged that even if successful in the section 96 complaint, at best, the Board would order the four grievances to arbitration. It would be up to an arbitrator to determine whether Mr. Gazit would be entitled to the relief sought by the grievances. Inherent in either remedial request was a request to set aside the settlement entered into on Mr. Gazit's behalf.

* * *

11. I will deal first with the section 96 complaint. Mr. Gazit wants his grievances to proceed to arbitration for the remedies requested therein, but he also wants the Board to order those same remedies in respect of his OHSA complaint. Both the grievances and the OHSA complaint are concerned with

the same alleged misconduct of the employer. This kind of duplicate litigation makes no sense. In effect, Mr. Gazit wants two opportunities to try to obtain the remedies he seeks; to pursue the grievances should he not obtain the remedies through his OHSA complaint.

12. Section 50(2) of the OHSA contemplates that a worker may have a matter under section 50(1) dealt with by the Board or by arbitration under a collective agreement. All of the conduct complained of in the grievances is conduct that is raised by the OHSA complaint. On April 16, 1996, Mr. Gazit's representative wrote to OPSEU advising that Mr. Gazit "is electing to pursue his remedy under the [OHSA] pursuant to section 50(2) before the Ontario Labour Relations Board and not as part of the arbitration process". Mr. Gazit has indicated he wants these matters dealt with as an OHSA complaint.

13. Had OPSEU abandoned these grievances on receipt of that advice there would have been no basis for Mr. Gazit to complain that OPSEU should pursue the grievances to arbitration. He would have been held to his choice of forum and OPSEU would have been relieved of any further responsibility in respect of the handling of the grievances by virtue of that choice. Mr. Gazit has made his choice. He does not want to have the matters raised by the grievances dealt with at arbitration. He has chosen to pursue those issues and remedies under the OHSA complaint. The filing of the section 96 complaint does not "undo" his decision, particularly when he continues to pursue the OHSA complaint.

14. In addition, paragraph 18 of the OHSA complaint states:

18. The Applicant acknowledges that he has five grievances presently outstanding against the Respondent arising from the same or similar circumstances described in this Application. He elects to receive relief and compensation for the acts of reprisal of the Respondent as set out in the aforesaid grievances through this Application and does not seek compensation or relief for any other conduct of the Respondent which he will continue to seek through the grievance and arbitration process.

15. Mr. Gazit has again indicated that the issues raised by the grievances are to be dealt with in his OHSA complaint. Whatever the latter words of that paragraph mean, Mr. Gazit cannot reserve some right to proceed to arbitration to deal with the same issues once those issues have been litigated elsewhere. Simply put, he cannot have "two kicks at the can". There is no basis for entering into an inquiry about OPSEU's conduct in the handling of the grievances when the remedy that would flow, that is, that these matters proceed to arbitration, is one that Mr. Gazit has indicated he has relinquished in order to pursue the matters under the OHSA.

16. Ought Mr. Gazit to be entitled to pursue the complaint against the union to argue that it acted inappropriately in settling three of his grievances? Although not pleaded by Mr. Gazit I will deal with that "secondary" issue. OPSEU received Mr. Kopyto's advice concerning the election to proceed under the OHSA on the same day it entered into a settlement of the grievances. Mr. Gazit had been aware of the proposed settlement for some time and had disagreed with it. OPSEU had earlier advised him that it was going to enter into the settlement in any event, based on legal advice provided to Mr. Gazit and reported to OPSEU and OPSEU's further consideration of the matters.

17. That settlement achieves the remedy sought in the first two grievances. The letter of discipline that was the subject matter of the first grievance is removed from Mr. Gazit's file. The College further agreed to return all copies of the psychiatric report to Mr. Gazit, the essence of the second grievance. Mr. Gazit acknowledged at the hearing that he had received that material from the College. The settlement goes on to acknowledge that the College has no control over any records retained by the attending psychiatrist. Further there is an agreement that should the College require a copy of the report in order to defend itself against the human rights complaint, it can seek to obtain a copy. However, it is agreed that that matter may be the subject of arbitration prior to the release of the

report. The third grievance was withdrawn. The subject matter of that third grievance is part of the first human rights complaint filed by Mr. Gazit against the College.

18. To the extent that any issue might remain as to whether or not OPSEU violated section 76 of the *CCBA* by entering into the settlement, with the remedial purpose of having the settlement set aside, I am of the view that no labour relations purpose would be served by entering into the inquiry. The settlement accomplishes the remedy requested for two of the grievances. Although the union withdrew the third grievance as part of the settlement it was clear to both parties to the settlement that the underlying subject matter of that grievance was not “dead”; that is, Mr. Gazit was still raising the issue of Mr. Hardy’s alleged harassment of him as part of his human rights complaint. Withdrawing the grievance at worst, only eliminated another “double forum” problem. I am not persuaded that it is appropriate to enter into an inquiry for the purpose of setting aside the settlement when that settlement produces positive results for Mr. Gazit and does not otherwise interfere with his ability to pursue his remaining concerns in another forum.

19. The fourth grievance is referred to only indirectly in the settlement, in that the parties to the settlement acknowledge that, except for the classification grievance, there are no other grievances outstanding. OPSEU and the College submit that I ought to exercise the discretion not to inquire into that aspect of the complaint by reason of delay. Mr. Gazit asserts that any delay is reasonable and ought not to preclude him from having the matter heard. There was no real dispute about the Board’s approach to delay in the exercise of its discretion in cases such as this. I was referred to the Board’s decisions in *The Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, *Mirza Alam*, [1994] OLRB Rep. June 627, and *Amalgamated Transit Union, Local 113*, unreported decision of the Board dated January 18, 1994, and the cases cited therein.

20. It was only at the hearing of this matter that Mr. Gazit identified that he was seeking a remedy for this fourth grievance. The grievance was filed on August 9, 1995. It alleges that Mr. Hardy “as per memo dated July 21/95 has unjustly exercised his rights under Article 3.1 of the collective agreement” (the management rights clause). The remedy sought is that all record of the memo be destroyed and a cease and desist order issue in respect of any further harassing actions. That memo deals with an incident where Mr. Hardy alleges that Mr. Gazit permitted a student to enter the library when it was closed and Mr. Gazit’s alleged response to Mr. Hardy when he asked Mr. Gazit to deal with the matter.

21. The grievance was not referred to arbitration. There was a Step 1 response to the grievance from Mr. Hardy to Mr. Gazit dated August 11, 1995. If one calculates the delay in raising this issue from the time the complaint was filed it is a delay of over nine months. If that time is calculated from the point when the parties were aware that Mr. Gazit was seeking a remedy in respect of that grievance the delay is some eleven months.

22. Mr. Gazit explains his delay on the basis that he was inured to waiting and to long time periods by his experience with the grievance and arbitration process in the past. However, one must consider this explanation carefully. Mr. Gazit acknowledged he was familiar with the grievance process, having filed eight grievances in his some six years of employment, and he asserts that he was concerned about the union’s treatment of him throughout this period. He agreed that he was aware of the three steps to the grievance procedure in the collective agreement and that Step 2 required a *grievor* to present his grievance within seven days from the Step 1 response. Article 18.2.1 of the collective agreement states that:

If the grievor fails to act within the time limits set out at any Complaint or Grievance Step, the grievance will be considered abandoned.

23. Mr. Gazit agreed he did not take his grievance to his Department Head at Step 2. Mr. Gazit asserted that he told his steward that he was unhappy and assumed it would go to the next step. He asserted that he contacted his steward in January or February 1996 to ask of the Step 2 and that the steward attempted to justify Mr. Hardy's response and then asked him if he wanted to get Mr. Hardy fired. If Mr. Gazit had concerns about the union's handling of this grievance those concerns were more than crystallized at that stage. More importantly he had waited some six months to raise an issue that he assumed the union was dealing with, although he was aware that the Step 2 process was in his hands. I have difficulty accepting Mr. Gazit's assertion of delays in the process when he acknowledges that he is familiar with the time periods set out in the collective agreement for the grievance process. The delay in the process occurs after the grievance process, from the time the matter is referred to arbitration until it reaches a hearing. OPSEU also relies on the *Colleges Collective Bargaining Act* and the absence of any statutory authority in an arbitrator under that Act to relieve against time limits as an indication of the importance of meeting the time limits in the grievance process and the effect of Article 18.2.1.

24. Mr. Gazit has raised his concerns repeatedly to the union in other respects and in other forums. Mr. Gazit was aware he could file a complaint before the Board, having done so in May, 1995. However, Mr. Gazit could not reasonably assume that this grievance was in any way raised by that complaint as the grievance occurred later in time. In February 1996 Mr. Gazit filed a human rights complaint against OPSEU. Throughout this period Mr. Gazit had been dealing with Mr. Richards, Senior Grievance Officer from OPSEU. In a letter to Mr. Richards dated August 21, 1995, Mr. Gazit refers to this grievance as another human rights violation by the College, but it is not raised again in any correspondence with the union. It is clear from the correspondence between Mr. Gazit and OPSEU that Mr. Gazit was aware that this grievance did not form part of the matters referred to arbitration and was not included in the proposed settlement. OPSEU makes no reference to the grievance in its correspondence to him concerning his grievances.

25. It does appear that Mr. Gazit was aware that the union believed the grievance to be resolved by Mr. Hardy's Step 1 response to the grievance. While I find Mr. Hardy's response to be somewhat ambiguous, that response does indicate that the letter in question was not put on Mr. Gazit's file, indicating that it was not intended to be disciplinary. While Mr. Gazit wanted the letter destroyed, it would be the case that the College would not have been able to rely on the incident it complains of if it was not intended to be disciplinary.

26. Overall I am persuaded that in the circumstances I ought to exercise my discretion not to inquire into this aspect of the complaint for reasons of delay. While the Board in other cases may have inquired into matters where a similar period of delay had occurred, the factors that the Board has set out in *The Corporation of the City of Mississauga, supra*, taken as a whole point to a different result in this case. The reasons for the delay are not persuasive in light of Mr. Gazit's knowledge of both his statutory and collective agreement rights and his evident concern with the union's handling of matters. He testified only that he told the steward he was unhappy with the Step 1 result and assumed it would go forward. He did not assert that the steward provided any assurance or other indication on which Mr. Gazit might have reasonably relied in making that assumption, in circumstances where he knew he was responsible for pursuing the matter at Step 2. He waited six months and presumably learned that the union had not pursued the matter. Again, there is no evidence he received any assurance the union would do anything. To the contrary, he received an explanation that appeared to accept the employer's position. Yet again he waited to file this complaint, while at the same time raising other concerns and pursuing other issues with Mr. Richards. By the time this matter is clearly raised the College and OPSEU have entered into a settlement in which they agree that no grievances, other than the classification grievance, remain outstanding. There is certainly no evidence to suggest that the College had reason to believe at any time that this matter remained outstanding.

27. I am also not persuaded that there are other sufficient labour relations reasons for entering into an inquiry concerning the union's conduct in respect of the fourth grievance. The remedy sought is to have the matter of the July 21, 1995 memo dealt with at arbitration. Mr. Gazit has filed a human rights complaint dated June 25, 1996 which alleges that he has been reprimanded in a discriminatory fashion and has been provoked and taunted by persons including Mr. Hardy. He asserts that these actions were taken as a reprisal against him for filing the earlier human rights complaint. That second human rights complaint appears to incorporate the same allegations as contained in the grievance.

28. In addition, if this grievance were to proceed to arbitration, and if Mr. Gazit were successful, the likely remedy would be an order removing the memo from Mr. Gazit's file. The Step 1 response states that the memo was never placed in Mr. Gazit's file. To arbitrate that issue would provide no greater real remedy than already exists. To the extent that Mr. Gazit seeks to assert that the issuing of the memo was part of an ongoing program of harassment by the College, that issue is much more appropriately dealt with by his broader human rights complaints. To deal with it at arbitration would require the calling of all of the evidence that would go to support an alleged pattern of misconduct; yet at the end of the day, an arbitrator, assuming the allegations were founded, would be limited to a remedy concerning only the memo and perhaps a broader declaration. The net result would have been a hearing as broadly based as the human rights complaint would contemplate, but with a much more limited remedial opportunity than Mr. Gazit seeks. (See generally *Mirza Alan, supra.*)

29. I therefore dismiss the section 96 complaint.

* * *

30. The allegations contained in the OHSA complaint deal with events alleged to have occurred as early as 1991. Mr. Gazit alleges that "harassment and discriminatory treatment in the manner described and set forth herein constitutes a hazard that presents a risk to the health and safety of an employee". He asserts that he suffered reprisals for bringing these issues to the attention of management. Assuming, and specifically without finding, that the Board has jurisdiction to enter into this inquiry under the *Occupational Health and Safety Act*, I am satisfied that the Board ought not to do so for the following reasons.

31. An OHSA complaint is dealt with by the Board pursuant to section 50(3) of the OHSA which incorporates the authority and discretion of the Board to inquire into a complaint under section 96 of the Act. There is good reason to adopt the same labour relations principles in dealing with complaints under the OHSA as the Board has long utilized in respect of unfair labour practice complaints. The Board is concerned with the ongoing relationship between the parties. It has long been a truism that 'labour relations delayed, is labour relations denied'. In matters of health and safety, the need for speedy resolution of outstanding disputes is self-evident. That is so not just to address any actual potential for danger to workers but to address any issue of reprisals in the workplace for raising health and safety issues, in order that workers are assured that such issues can be raised without fear of retaliation.

32. Mr. Gazit asserts that he delayed in filing an OHSA complaint because he was attempting to address the issues through other avenues, he did not have legal counsel, and the stress and anxiety he was suffering inhibited his ability to file. I do not accept these reasons as sufficient to warrant the Board entering into an inquiry with respect to a large portion of Mr. Gazit's complaint. Even assuming that Mr. Gazit was labouring under stress he was able to complain to the President of the College, the Council of Regents of the College, the Ombudsman, the Ministry of Education, the Human Rights Commission, and to the Board. There is no evidence to suggest that his medical condition was such that he could not have pursued a complaint under the OHSA to the Board.

33. If Mr. Gazit felt that the alleged reprisals were as a result of his raising health and safety concerns, there is no adequate explanation for his not pursuing the matters sooner. The evidence establishes that Mr. Gazit is quite capable of asserting his rights and concerns. The Board has long held that a failure to obtain advice or a decision to pursue other avenues is insufficient to overcome unreasonable delay. It is apparent from Mr. Gazit's own evidence, taken together with his correspondence to various parties throughout this period, that he did not see the actions of the College as matters involving health and safety issues. His correspondence consistently addresses the issues as human rights concerns. This was the case even after his separation from employment. Mr. Gazit testified that when he learned of his termination (the College's position is that he was laid-off) he felt it was a reprisal for filing the human rights complaint. The first reference to the OHSA appears to be the letter from Mr. Gazit's representative dated April 16, 1996 to OPSEU, advising OPSEU of Mr. Gazit's election to proceed under the OHSA complaint.

34. Mr. Gazit filed his first human rights complaint on June 28, 1995. This complaint was filed on May 27, 1996. There is simply no reason that Mr. Gazit could not have filed this complaint sooner. All of the matters raised were within his knowledge, and all events to June 1995 are raised by the first human rights complaint.

35. The College acknowledged that some of the matters raised by this complaint are timely and I agree. Mr. Gazit's separation from employment occurred in March 1996. On a review of the pleadings and the documents filed in support of this complaint, the matter of the July 21, 1995 memo from Mr. Hardy is also included as part of this complaint. As I have already reviewed, Mr. Gazit did not pursue that matter through the grievance procedure. There is no sufficient reason to allow that matter to be revived when it was not initially pursued. I am satisfied that all aspects of the OHSA complaint ought properly to be dismissed on the ground of delay except for any issue surrounding Mr. Gazit's separation from employment in March 1996.

36. I am further satisfied that it is appropriate to stay the hearing of any such remaining complaint until Mr. Gazit's human rights complaints against the College have been determined. The second human rights complaint was filed on June 25, 1996 and asserts that the termination from employment was a reprisal for having filed the first human rights complaint. *All* of Mr. Gazit's concerns are, at root, his assertion that he has been subjected to an ongoing pattern of discriminatory treatment by reason of his age, creed, and sex. His concern about a "poisoned work environment" all stem from what he has consistently asserted are human rights violations. That is manifestly confirmed by a review of his correspondence to all of the various bodies and parties he contacted or dealt with over the some five years in question.

37. Mr. Kopyto offered to withdraw the human rights complaints at the hearing. He asserted a loss of confidence in that process. I cannot accept that assertion where Mr. Gazit has filed two further recent complaints, one each against the College and OPSEU. Offering to withdraw also assumes that Mr. Gazit has that option under the Commission's process. Even assuming that the withdrawal of those complaints might be a factor in my determination, the complaints were extant when the issue was put before me. Mr. Gazit is forum shopping. It is inappropriate and an enormous waste of public and private resources. All of the concerns that Mr. Gazit has raised are before the Human Rights Commission. The remedies that he seeks are also much more within the ambit of the Commission's usual and often broader, remedial work. (See generally, *Mirza Alan, supra.*)

38. In summary, the section 96 complaint is dismissed. The OHSA complaint, except any matter concerning Mr. Gazit's separation from employment in March 1996, is also dismissed. The remaining portion of the OHSA complaint, that is, the allegation that Mr. Gazit was terminated from employment as a reprisal in violation of section 50(1) of the *Occupational Health and Safety Act* is hereby stayed

pending the outcome of Mr. Gazit's human rights complaints against the College dated June 28, 1995 and June 25, 1996.

39. I would note that it is unnecessary to deal with the jurisdictional issue at this stage. Should the remaining matter be brought back before the Board, that issue remains to be determined.

3884-95-R The Municipality of Metropolitan Toronto, Applicant v. Canadian Union of Public Employees, Local 79, Responding Party

Evidence - Security Guard - Practice and Procedure - Employer seeking to terminate union's bargaining rights for bargaining unit of guards under transitional provisions of Bill 7 - Employer asserting that as result of 1994 Board decision in connection with application to combine bargaining units and that decision's conflict of interest finding, doctrine of issue estoppel applying such that Board should terminate union's bargaining rights without need for further hearing - Board concluding that issues in earlier decision and in current proceeding under Bill 7 not the same and that matter ought not to be resolved without affording the union an opportunity for a hearing

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *J. A. Rundle* and *P. V. Grasso*.

APPEARANCES: *Darrel A. Smith* and *Margaret A. Bromley* for the applicant; *J. James Nyman* for the responding party.

DECISION OF RUSSELL G. GOODFELLOW, VICE-CHAIR, AND BOARD MEMBER P. V. GRASSO; July 18, 1996

1. This is an application for a declaration terminating the trade union's bargaining rights under section 8(2) of the Transitional Provisions of the *Labour Relations Act, 1995*. Section 8 states:

8. (1) This section applies with respect to bargaining units that include, on the day this section comes into force, guards who monitor other employees or who protect the property of an employer.

(2) Within 90 days after this section comes into force, an employer may apply to the Ontario Labour Relations Board for a declaration that a trade union no longer represents the guards in a bargaining unit,

- (a) if the trade union admits to membership persons who are not guards; or
- (b) if the trade union is chartered by or affiliated with an organization that admits to membership persons who are not guards.

(3) The Board shall issue the declaration unless the trade union satisfies the Board that no conflict of interest would result from the trade union continuing to represent the guards.

(4) Within 90 days after this section comes into force, an employer may apply to the Board for a declaration that guards are no longer members of a bargaining unit that includes other employees.

(5) The Board shall issue the declaration unless the trade union satisfies the Board that no conflict of interest would result from the guards remaining in the bargaining unit.

(6) The Board shall consider the factors set out in subsection 14(5) of the new Act in determining whether a conflict of interest would result for the purposes of subsection (3) or (5).

(7) Upon the issuance of a declaration under this section, the collective agreement, if any, ceases to apply with respect to the guards.

2. Section 14(5) of the Act provides:

14. (5) The Board shall consider the following factors in determining whether a conflict of interest would result:

1. The extent of the guards' duties monitoring other employees of their employer or protecting their employer's property.
2. Any other duties or responsibilities of the guards that might give rise to a conflict of interest.
3. Such other factors as the Board considers relevant.

3. A hearing was held in this matter on June 6, 1996. At the outset of the hearing, the parties advised the Board that they had agreed to deal, first, with a preliminary issue raised by the applicant and, depending upon the disposition of that issue, continue the hearing at a later date. Relying on an earlier decision between the same parties, the applicant argued that the doctrine of issue estoppel applies, such that the Board should terminate the responding party's bargaining rights without the need for any further hearing.

* * *

4. The union was certified to represent a bargaining unit consisting of full-time security guards (described by the parties as "security officers") on February 13, 1995. In a decision reported at [1994] OLRB Rep. June 795, the Board found that the union was in a certifiable position with respect to this unit and determined that a conflict of interest would arise if, at the request of the union, it were to combine that unit with another unit already represented by the union. (A subsequent decision dismissing the combination application on this and other grounds is reported at [1995] OLRB Rep. Feb. 182.)

5. In dealing with the conflict issue, the Board considered the effect of subsection 6(6) of the former *Labour Relations Act*, which read:

6.- (6) A bargaining unit consisting solely of guards who monitor other employees shall be deemed by the Board to be a unit of employees appropriate for collective bargaining,

- (a) if the applicant trade union or the employer requests that the Board do so; and
- (b) if the Board is satisfied that the monitoring of other employees would give rise to a conflict of interest if the guards were included in a bargaining unit with the employees they monitor.

After reviewing the evidence concerning the duties and responsibilities of the security officers ("SOs"), the Board concluded that "the monitoring of other employees by SOs raises the real possibility of a conflict of interest if the SOs were included with the full-time bargaining unit".

6. On the basis of this finding, and referring to a recent decision of the Court of Appeal in *Rasanen v. Rosemount Instruments Limited* (1994), 1 C.C.E.L. (2d) 161 and a number of Board decisions (ie. *Arnold Markets Ltd.* (1961), 62 CLLC ¶16,221; *Holland River Gardens Co. Ltd.* (1964), 64 CLLC ¶16,304; and *Canadian General Electric Company Limited*, [1978] OLRB Rep. Apr. 384), the applicant argued that the requirements for the application of the doctrine of issue estoppel are present: (1) the same question (i.e. the existence of a conflict of interest between the SOs and other employees represented by the union at Metro) has already been decided; (2) the earlier decision was

final; and, (3) the parties in the earlier proceeding were the same as they are in the present case. According to the applicant, the issue of conflict has already been resolved between these parties, and to inquire further into this matter would offend the principle that there ought to be an end to litigation.

* * *

7. Issue estoppel is a rule of evidence. It serves to prevent a party against whom an issue has earlier been decided from calling evidence to contradict that result. As the Board noted in *Canadian General Electric Company Limited*, *supra*, pp. 389-390, at para. 20, the rule is not without exceptions:

Two factors that would negate the application of an otherwise successful plea of *res judicata*, however, would be either a material change in the law or a significant change in the facts since the original decision.

8. In this case, there is no argument that there has been a material change in the facts. Indeed, the union expressly acknowledged that the duties and responsibilities of the SOs have not changed since the Board's earlier decision. The union did argue, however, that there has been a material change in the law, such that it would be inappropriate to rely on the Board's earlier findings as dispositive of the issues in this case.

9. A majority of this panel agrees with the responding party. Essentially, it is our view that, although there is clearly a substantial overlap between the issue decided in the earlier proceeding and that which is raised before us, the issues are not the same and, accordingly, the matter ought not to be resolved without affording the responding party an opportunity for a hearing on the merits.

10. The statute has recently undergone a number of changes. Prior to Bill 40, section 12 of the Act prohibited the Board from (1) including in a bargaining unit with other employees "a person employed as a guard to protect the property of an employer" and, (2) from certifying a trade union for a bargaining unit consisting of such guards if the union "admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards". In giving effect to this provision, the Board defined the word "guard" by reference to a "conflict of interest" test. The effect of that test was that the Board would apply the prohibitions contained in section 12 in respect of those guards whose duties raised a real possibility of a conflict of interest between their duties to the employer and their allegiance to other union members.

11. In developing its conflict of interest test, the Board expressly recognized that it was engaged in a balancing of interests between the rights of employees to engage in collective bargaining through a trade union of their choice and the rights of employers to expect undivided loyalty in the performance of an employee's duties. In *Wells Fargo Armcar Inc.*, [1981] OLRB Rep. July 1046 application for judicial reviewed dismissed (1982), 36 O.R. (2d) 361 (Div. Ct.), the Board put the matter this way:

Since the effect of section 11 is to place limits on what constitutes an appropriate bargaining unit and on an employee's free choice of what trade union will represent him in collective bargaining, this test is a reasonable balancing of those restrictions with the need to protect an employer from the conflict posed by a guard's duty to protect that employer's property and any loyalty that the guard might feel towards other employees of the employer. [para. 16]

12. Subsequently, under Bill 40, the absolute prohibition against certification of a bargaining unit consisting of both guards and non-guards, and against the representation of guards by certain types of trade unions, was repealed. The only remaining restriction, imposed at the request of either party, was the inclusion of guards within their own bargaining unit provided the Board was "satisfied that the monitoring of other employees would give rise to a conflict of interest if the guards were included in a bargaining unit with the employees they monitor". Section 8 of the Transitional Provisions of the new

Act seeks to overcome the effects of the Bill 40 provisions by enabling employers to apply to the Board for a declaration terminating bargaining rights for those trade unions that admit to membership persons who are not guards or that are “chartered by or affiliated with an organization” that does so. Pursuant to section 8(4), the Board is required to grant the declaration *unless* the *trade union* satisfies the Board that *no* conflict of interest would result from the continued representation of the guards by the trade union.

* * *

13. The changes in statutory language affect the employer’s argument in two ways. First, the consequences of a finding of conflict differ as between the Board’s 1994 decision and the present case. In 1994, the issue was dealt with in the context of an application to combine bargaining units under section 7 of the Act. Although the combination application was, ultimately, dismissed, the trade union’s bargaining rights were maintained. The employees continued to be represented by the union of their choice, albeit in a “guards only” bargaining unit. In the present case, by contrast, a finding of conflict would prevent the employees from being represented by the bargaining agent of their choice and, in fact, would leave them unrepresented.

14. Second, the issue to be decided in the earlier proceeding is not the same as in the present case. In the combination application, the issue was whether there was a real possibility of conflict if the guards were to be included in the same bargaining unit with the employees they monitor. Now, the issue is whether any conflict of interest would arise because “the trade union admits to membership persons who are not guards” and “is chartered by or affiliated with an organization” that does so. In other words, the issue is whether a conflict of interest would arise in circumstances where the SOs and the persons they monitor are in different bargaining units.

15. Moreover, unlike the situation under Bill 40 or the legislation that preceded it, the Board is now expressly required to consider the following “in determining whether a conflict of interest would result”:

1. The extent of the guards’ duties monitoring other employees of their employer or protecting their employer’s property.
2. Any other duties or responsibilities of the guards that might give rise to a conflict of interest.
3. Such other factors as the Board considers relevant.

16. While it is true, as employer counsel points out, that subsection 6(6) of the former Act also required the Board to consider the “monitoring” of other employees and that the Board evaluated “the extent” of that monitoring in its earlier decision, the context was different. In the earlier case, the evidence was evaluated against the possibility of employees being included within the same bargaining unit as the employees they monitor, not in a separate bargaining unit. It is at least possible, therefore, as counsel for the responding party points out, that the *extent* of the monitoring that was sufficient to support a finding of conflict in the earlier decision would not result in the same finding in the present case. Moreover, and again as responding party counsel suggests, it is also possible that “other factors” (see para. 14(5)3 of the Act) may now be relevant to a finding of conflict that may not have been considered previously (e.g. provisions in the union’s constitution designed to deal with the possibility of conflicts between guards and other members).

17. Consequently, and while there may be some attractiveness to the notion that a “conflict is a conflict is a conflict”, the Board is conscious of the fact that the tests it applies and the conclusions to

which it comes are influenced by changes in both law and context. Where such changes occur, the Board must be prepared to consider the possibility that outcomes may also change.

18. Having said that, it is not obvious to the panel that there is much in the way of additional evidence that the responding party might wish or, in fact, be entitled, to call. As already indicated, counsel agreed that the duties and responsibilities of the SOs have not changed, and those duties were canvassed at some length in the Board's earlier decision. Accordingly, two weeks prior to the continuation of the hearing in this matter, the trade union will be required to file with the Board and the applicant a detailed statement of the additional material facts upon which it intends to rely and an outline of the argument it wishes to make. Within one week of the receipt of that information, the applicant must file its reply with the Board and the responding party.

19. The matter is referred to the Registrar to schedule additional hearing dates in consultation with the parties.

DECISION OF BOARD MEMBER J. A. RUNDLE; July 18, 1996

1. The parties in the present case are agreed that there has been no change in the job duties of the Security Officers since the date of the prior ruling ([1994] OLRB Rep. June 795). In that earlier decision the Board, within the strict confines of the language of subsection 6(6) of Bill 40, found a conflict of interest existed. The premise underlying subsection 14(5) of the current Act is conflict of interest therefore it is unclear to me why the limited resources of the Board are being used to further inquire into this matter.

2199-95-U; 3047-95-FC; 3132-95-R Labourers' International Union of North America, Local 1059, Applicant v. **Old Oak Properties Inc.** and Ewald Bierbaum, Responding Parties; Labourers' International Union of North America, Local 1059, Applicant v. Old Oak Properties Inc., Responding Party; Old Oak Properties Inc., Applicant v. Labourers' International Union of North America, Local 1059, Responding Party

Duty to Bargain in Good Faith - First Contract Arbitration - Security Guard - Termination - Unfair Labour Practice - Board dismissing employer's application under Bill 7 transition provisions to terminate Labourers' union bargaining rights respecting guards - Board finding that no conflict of interest would result from Labourers' union continuing to represent the guards - Board finding that employer breached duty to bargain in good faith by misrepresenting its position respecting contracting out, by arbitrarily reneging on earlier agreements and by sending negotiators without authority to represent an employer position in bargaining - Board granting union's application to direct that first collective agreement be settled by arbitration

BEFORE: *Jerry Kovacs*, Vice-Chair.

APPEARANCES: *Lorne Richmond, Luiza Monteiro, Jim MacKinnon and Irene Nowicki* for Labourers' International Union of North America, Local 1059; *Monique Smith, Greg Bierbaum, Aly Lalani and Jim Reilly* for Old Oak Properties Inc.

DECISION OF THE BOARD; August 16, 1996

1. Board File No. 2199-95-U is an application by the Labourers' International Union of North America, Local 1059 ("the Labourers") under section 96 of the *Labour Relations Act, 1995* alleging various contraventions of the Act by Old Oak Properties Inc. ("Old Oak"), including the statutory duty to bargain in good faith. Board File No. 3047-95-FC is the Labourers' application for direction that a first collective agreement be settled by arbitration. Board File No. 3132-95-R is Old Oak's application for a declaration to terminate the the Labourers' bargaining rights in respect of security guards.

2. At the time of these proceedings, the Labourers were conducting a lawful strike. The parties were no longer making efforts to negotiate a first collective agreement.

I. NATURE OF PROCEEDINGS

3. On May 16, 1995, the Labourers were certified as bargaining agent for all security guards in the employ of Old Oak. Old Oak is a property-holding and building-management company in London.

4. At that time, the governing statute was the *Labour Relations Act*, R.S.O. 1990, c. L.2, as amended by certain Acts between 1991 and 1994 ("the old Act", or "Bill 40"). Under that version of the Act, there were no restrictions on the type of trade union that might represent security guards. Bill 40 had repealed what was once section 8 of the Act ("the pre-Bill 40 Act"). Under the pre-Bill 40 Act, only unions that represented no one other than guards (i.e., "guards-only" unions) were permitted to represent guards. Membership in the Labourers' union is not restricted to guards.

5. Although bargaining between the Labourers and Old Oak began well, the parties' relationship faltered in late August, 1995. The flashpoint of conflict was Old Oak's announcement that it had contracted with Burns International Security Services Limited ("Burns") for the purpose of 'contracting-out' all of the security services that were performed by Old Oak employees represented by the Labourers. Under section 64.2 of the old Act then in force, contracting-out of security services was deemed to constitute a sale of business for the purposes of the Act's sale of business provisions. Old Oak took the position that the Labourers ought to be bargaining with Burns. Both Old Oak and the Labourers were aware that Burns was bound to a collective agreement with the United Plant Guard Workers of America, Local 1956 ("UPGWA") that covered all security guards employed by Burns in the London area. Both parties were also aware of the announced intention of the government to repeal Bill 40.

6. On September 6, 1995, the Labourers filed a complaint under section 91 of the old Act alleging that Old Oak and its principal owner and chief negotiator, Ewald Bierbaum, had violated the Act by, *inter alia*, breaching the duty to bargain in good faith and by altering terms and conditions of employment during the statutory 'freeze' period provided for in section 81. That matter is before this panel of the Board in File No. 2199-95-U.

7. On September 8, 1995, the Labourers commenced a lawful strike. Further collective bargaining was unsuccessful.

8. On November 14, 1995, the Labourers applied under section 41 of the old Act for a declaration that the first collective agreement be settled by arbitration. That matter is also before this panel in File No. 3047-95-FC.

9. On November 10, 1995, the *Labour Relations and Employment Statute Law Amendment Act, 1995* (or "Bill 7") came into force. The Bill had received first reading on October 4, 1995, in midst of these parties' conflict. Bill 7 repealed the old *Labour Relations Act* and replaced it with the *Labour Relations Act, 1995*.

10. Bill 7 changed the law once more with respect to representation of guards. A union that is not a guards-only union may be certified as bargaining agent for guards *unless* an employer objects. In that event the union must satisfy the Board that no conflict of interest would result from the union becoming bargaining agent for guards. Bill 7 also repealed what was section 64.2 of the Act. The parties did not dispute the resulting effect that the contracting-out of security services would no longer constitute a sale of business for the purposes of the Act.

11. Although the Labourers became the bargaining agent for guards in this case prior to the coming into effect of the new Act, Bill 7 contains transitional provisions that affect the union's bargaining rights. Those provisions permitted an employer to apply to the Board for termination of bargaining rights held by unions that are not guards-only unions, provided the application was made within 90 days of the coming into force of Bill 7. In the event of such application, the transitional provisions direct the Board to terminate bargaining rights of the union unless the union satisfies the Board that no conflict of interest would result from the union continuing to represent the guards.

12. On November 20, 1995, Old Oak applied to the Board for termination of the Labourers' bargaining rights pursuant to the transitional provisions of Bill 7. That matter is also before this panel in File No. 3132-95-FC.

13. When the matters came on for hearing commencing December 4, 1995, the guards in the Labourers' bargaining unit at Old Oak were engaged in a lawful strike. At the outset of the hearing, Old Oak proposed that the Board first hear and determine independently the employer application for termination of the union's bargaining rights, since success in that matter would dispose of the union's two applications. In all of the circumstances, including the ongoing strike and the parties' anticipation of lengthy proceedings in respect of the conflict of interest issue, I ruled orally that all three matters would be heard concurrently. The parties then presented evidence and argument in respect of all of the applications.

II. SUMMARY - DISPOSITION OF THE THREE APPLICATIONS

Guards Conflict of Interest

14. Guards employed by Old Oak are not responsible for monitoring other employees of Old Oak. In any event, no other employees of Old Oak are represented by the Labourers. However, Old Oak 'contracts out' for the provision of cleaning services at its commercial buildings in downtown London. The Labourers represent cleaners employed by certain contractors who perform cleaning services for Old Oak at those buildings.

15. Although guards come into contact with cleaners in the course of their duties, the guards have no particular duty to monitor the cleaners. Guards are responsible for keeping and distributing the keys used by cleaners, but the relaxed system of key control is typical of the minimal security requirements in the downtown buildings. There are no "lunchbucket searches" conducted. Further, the guards have no authority over cleaners, and there is no indication of favouritism in treatment of cleaners who are fellow union members.

16. Despite the ongoing strike and picketing by guards represented by Labourers, there has been no disruption of the work performed by cleaners.

17. In all of the circumstances, I find that no conflict of interest would result from the Labourers continuing to represent the guards.

Breach of the Duty to Bargain in Good Faith

18. Old Oak misrepresented its position with respect to the contracting out of security services. At the same time that Ewald Bierbaum was bargaining limits on the right of the employer to contract out, Old Oak had already entered into a contract with Burns for security services. The union was informed after the action was taken and after employees were notified. From that point forward, Old Oak failed to bargain in good faith and failed to make every reasonable effort to make a collective agreement. At the only bargaining session that occurred after commencement of the Labourers' strike, Old Oak arbitrarily reneged on all earlier agreements the parties had made. In addition, Old Oak sent negotiators who had no authority to represent an employer position in bargaining. Old Oak and Ewald Bierbaum thereby violated section 17 of the Act.

Direction to Arbitrate First Collective Agreement

19. The process of collective bargaining has been unsuccessful because of the employer's refusal to recognize the bargaining authority of the union and the employer's failure to make reasonable or expeditious efforts to conclude a collective agreement. Despite oral agreement in principle on the inclusion of some limit on the employer's right to contract out, Old Oak contracted out all bargaining unit work without warning in the midst of ongoing collective bargaining and refused to carry on bargaining. When it did return to bargaining, the employer consistently refused to discuss restrictions on the right to contract out; indeed, it changed its position to demand no restrictions in that regard. Moreover, the employer retracted its positions in respect of all other terms of the agreement, most of which had been agreed to prior to the commencement of the strike. The employer's approach to bargaining caused irreparable breakdown in the process of bargaining.

20. In accordance with section 43(2) of the Act, the first collective agreement between these parties shall be settled by arbitration.

III. REASONS FOR DECISION

File No. 3132-95-R: Guards Conflict of Interest

(i) The Evidence

21. Old Oak develops, owns, leases and manages commercial, residential and industrial properties in the London area. It is amongst the most successful companies in its field, controlling thousands of residential, commercial and industrial units. The company is held and controlled by Ewald Bierbaum and his children, Greg Bierbaum, Bernie Bierbaum and Carroll Scott. Starting with little or nothing, Ewald Bierbaum built a substantial enterprise. He is the major shareholder and the ultimate decision-maker in the business. His children constitute the balance of the Board of Directors of the corporation.

22. Local 1059 is the London area local union chartered by the Labourers' International Union of North America. Of its approximately 2000 individual members, some 1300-1400 are employed in the construction industry. The rest of its members work in the service sector and include cleaners, security guards, day-care workers and employees of light manufacturing companies. The bulk of this non-construction membership, or about 500 members, are cleaners. The Labourers became very active in organizing cleaners after the enactment of Bill 40 amendments to the *Labour Relations Act* and the *Employment Standards Act* that provided successor rights to unions and a measure of job protection to employees upon changes in cleaning contractors used by building owners or managers. The same legislative changes also governed security guards and, to a much lesser extent, the Labourers also began organizing guards in the security industry.

23. Currently the Labourers represent guards in 4 different bargaining units, for a total of 35-45 guard members.

24. In the spring of 1995, guards employed by Old Oak researched the collective agreements of various unions that represent guards and decided to contact the Labourers. By May 16, 1995, the Labourers were certified as the bargaining agent for Old Oak guards.

* * *

25. Local 1059 of the Labourers is led by its Business Manager, Jim MacKinnon. In addition to MacKinnon, the union employs other staff: 3 business representatives, 1 organizer and 3 support staff. Two of the business representatives service the construction industry membership, while the third - Irene Nowicki - is responsible for the non-construction membership, i.e., including both guards and cleaners. MacKinnon is responsible for negotiation of all first collective agreements and also leads negotiations for most renewal agreements. He has also participated regularly in negotiation of province-wide collective agreements in the industrial, commercial and institutional sector of the construction industry. MacKinnon is also involved in most major decisions that affect the union, including whether particular bargaining units should engage in strike action.

26. In cross-examination, MacKinnon reviewed the constitution of the union with employer counsel. It provides a constitution for the international level of the union as well as constitutions for local unions (such as Local 1059) and for district councils (such as the Ontario Provincial District Council that includes all of the Labourers' local unions in Ontario). It also contains a variety of statements of purposes of the union and of obligations of membership. It is unnecessary to discuss those further other than to state the obvious: the union requires 'solidarity' among its members. However, it does not include a code of conduct in respect of dealings with fellow members. It does not, for instance, contain specific requirements that members support the picket lines of fellow members, nor prohibitions on members working for other employers on locations that are affected by a strike involving a separate employer. MacKinnon stated that Labourers' construction workers will continue to work on an employer's project even if Labourers' members in a different sector are on strike against the same employer. Accordingly, when the Labourers conducted a strike in the sewer and watermain sector, Labourers members would continue to work for affected contractors who also performed work in other (non-struck) construction sectors (e.g., the roads sector).

27. MacKinnon confirmed that all members of the union - construction workers, cleaners, guards, etc. - are invited to and may in fact attend various union gatherings. That includes monthly membership meetings (which the local may not in fact conduct on a monthly basis) and meetings associated with local executive board elections and other elections. Although general membership meetings are supposed to occur monthly, MacKinnon calls such meetings far less regularly. Instead, Local 1059 more usually holds meetings for each bargaining unit or sector of employees. The union mails two newsletters to all members each year. It offers training courses to all members. All members are invited to Christmas parties and in the last few years the union has organized a summer picnic for all members and their families.

28. In the case of Old Oak guards' strike, Nowicki (the business representative who services both cleaners and guards) was involved in organizing the picket line maintained at the downtown premises; MacKinnon also played a role in ensuring the picket line was maintained. After the strike began, an Old Oak manager found Labourers' postings regarding the guards' strike inside the premises in downtown Old Oak offices that are reserved for use by the cleaning subcontractor and its cleaner employees; in the posting, the Labourers ask that Old Oak tenants support the guards in their job action against Old Oak.

* * *

29. The guards in the Old Oak bargaining unit work in 3 areas - a downtown commercial/residential building complex, a residential complex of 7 apartment buildings, and an industrial mall of some 160 units known as the Meadowbrook industrial site.

30. Most of the guard work is at the downtown location consisting of 5 high-rise buildings and parking garages. Three of the buildings span a city block and comprise the "Talbot Centre"; Old Oak built the two 18-floor towers located at 140 and 148 Fullerton Ave. in 1988-1990, and later added 465 Richmond Street to the complex. Between the two buildings on Fullerton and the third on Richmond is a complex of retail spaces including a food court. The Talbot Centre towers also include some residential units. Near to the Talbot Centre is the 10-floor tower at 130 Dufferin Avenue known as the "Dufferin Corporate Centre". Adjacent to it is the fifth building, the "Xerox Centre" at 150 Dufferin. In total, the five buildings house about 800,000 square feet of leased space. About 50,000 square feet is retail space with the balance occupied by office or commercial or residential tenants. There are multi-level parking garages attached to the Talbot Centre (with about 500 spaces) and the Xerox Centre (with about 450 spaces). There are also underground parking lots with about 550 spaces and a surface parking lot between the Dufferin Corporate Centre and the Xerox Centre with about 100 spaces.

31. The downtown commercial space is occupied by a variety of public and private sector tenants, including corporate offices, lawyers' and accountants' offices, government offices, RCMP offices, and the offices of Old Oak. Although the Old Oak office has employees, there was no evidence or issue that arose regarding any interaction between the guards and Old Oak office employees.

32. Old Oak employs maintenance staff for building systems maintenance and equipment repair (2 full-time and one part-time) and car-park staff (11 part-time) and snow removal/landscape staff (1 person) and security staff. None of them are unionized.

33. The company does not directly employ cleaners. At the Talbot Centre and Dufferin Corporate Centre, Old Oak contracts for cleaning services with Martin's Building Maintenance (or David Martin Enterprises (London) Limited) (hereinafter referred to as "Martin's"). Martin's cleaners are represented by the Labourers. It is the interaction of these cleaners and the guards at those locations - all represented by the same union - that is said to give rise to a conflict of interest that should result in termination of the Labourers' representation rights for the guards, and I will provide greater detail below. The cleaners at the Xerox Centre are employed by Metropolitan Building Maintenance, whose contract Old Oak inherited when it purchased the Xerox Centre in 1992. Metropolitan's cleaners are also represented by the Labourers' union. Old Oak guards have little or no interaction with the cleaners at the Xerox Centre or, for that matter, with any cleaners that may be employed by cleaning contractors at either the 7-tower residential complex or the 160-unit industrial mall. In any event, there was no issue regarding any such interaction.

34. Prior to the Labourers strike, Old Oak maintained a schedule of 15 full-time guards; the schedule was affected by the strike and by the parties' eventual agreement regarding provision of essential services during the strike.

35. It is worth noting that none of Old Oak's proposals nor any part of the parties' eventual agreement regarding essential services lists any reference to the necessity of monitoring the employees of subcontractors e.g., cleaners. (For further discussion of the parties' bargaining, see the decision below in respect of the complaint of bad faith bargaining.)

36. In the normal course, 11 guards are employed over 3 shifts around the clock at the downtown buildings. Three guards are employed on the 7-tower residential site, one of whom averages a 40-hour work week while the other two average a 30-hour work week.

37. At the downtown complex, 2 guards work the day shift. One of the guards remains stationed at the information desk at 140 Fullerton, which is the guards' main station at the Talbot Centre. The other guard patrols or 'floats'. The information desk is a busy traffic centre during the day shift. The guard stationed there gives directions to the many visitors to the complex, and the desk becomes a 'receiving area' for the many deliveries coming to the various buildings. At the desk is a television monitoring system with 4 monitors. Two of the monitor screens are divisible into 16 boxes, so that a guard can monitor the images shot by the 32 cameras located at building entrances/exits, parking areas and the food court (there are none elsewhere within building, i.e., there are none on the tenant floors where the cleaners are at work). Although the cameras are fixed, i.e., do not move or rotate, they do feature a 'zoom' feature allowing the guard to focus more closely on persons. The system allows the guard to call any one of the 16 images up onto the full screen for better view.

38. The information desk, however, is a busy area during the day shift and the guard stationed there is unable to monitor the camera surveillance system with much regularity. The same is true of the 'enunciator panels' that control fire alarm systems throughout the downtown complex. In addition to the interruptions by delivery people and by inquiries from the public, the guards are also responsible for issuance of building access permits and parking passes to tenants. This involves taking information from the applicant, taking photographs, producing laminated cards, and receiving payment. The desk guard also controls an intercom system for the various entry points and elevators in the buildings (and which can be used for emergency "all-call" announcements throughout the buildings), as well as an emergency phone system. In addition, there is a telephone at the desk where the guard takes calls regarding general information, security concerns, building maintenance problems, and requests for moving carts/equipment. The guard is also responsible for the control of elevators, e.g., providing for service usage.

39. A log-book is kept at the desk. In it guards keep a detailed account of their observations (both at the desk and on patrol), of incident reports, of phone calls, and of any action taken by the guards. Some examples of the use of the log-book are described below.

40. The guard at the desk as well as the floater guard carry 2-way radios. About 30 persons carry a radio and are "on the system", from Ewald Bierbaum to the Martin's manager/lead hand to the Old Oak building maintenance staff to the guards at all of the Old Oak locations.

41. The patrol or floater guard on the day shift at the downtown complex uses the information desk as his base. He walks through the buildings and around the perimeter of the buildings, watching for anything suspicious or problematic. He may remove transients from the food court, or report a gas leak to maintenance staff, or a spill to the Martin's cleaner (using the 2-way radio or simply telling down the cleaner if they pass each other). He enforces the no-smoking rule, he helps tenants having problems with access cards, he does a safety check in parking areas, and he answers questions from anyone who might 'flag him down' (guards are noticeable in that they wear uniforms). On occasion, he may assist a tenant; for instance, a court reporting service has asked for the presence of a guard when concerned that a deponent might be violent. Parking attendants might bring problems to the guard's attention (e.g., an unsafely parked car, in which case the guard may attempt to locate the driver). He may also assist the regular delivery persons who attend at the downtown site.

42. Although Martin's has cleaners on the premises most days between 6:00 a.m. through until 1:00 a.m., there is only a skeletal staff of cleaners (one or two) working during the guards' day shift; during the day the 2-way radio in Martin's control is usually held by the Martin's supervisor. They

mainly service the food court and retail common areas. The majority of the cleaners (dozens) work after normal business hours, when most tenants close for the day. Martin's assigns cleaners to clean each of the floors in the Talbot Centre and Dufferin Corporate Centre, with each cleaner working alone or sometimes with another cleaner. A Martin's lead hand usually has the 2-way radio during the busy afternoon shift.

43. The afternoon shift of guards at the downtown site starts at 3:00 or 4:00 p.m. and is staffed by 3 guards. One guard is stationed at the desk, another patrols the Talbot Centre and adjacent parking, and the third patrols the Xerox Centre and adjacent parking. All three are in radio communication with each other. By 6:00 p.m. most offices are closed and the buildings have cleared for the most part. Guards on patrol or floater duty are responsible for lock-up checks to ensure that tenants' premises are locked. They check most floors with the exception of those where the tenant continues business hours of operation (e.g., Bell has a crew working until 11:00 p.m.). They check the mechanical rooms. They patrol the perimeter of each building.

44. During these recurring 'rounds', the floater guards look for anything unusual or problematic, e.g., a toilet running, a coffee machine left on. They report minor maintenance items, e.g., burned-out lights, broken door hardware, water leaks. If they discover a serious problem (e.g. a broken watermain), they will contact maintenance staff or a contractor; if the problem is less serious (e.g., broken door handle), they simply log the item in the guard log book kept at the information desk. The floater or patrol guards also check elevators to ensure that those that should be locked off are locked and that those that the cleaners are using for service purposes have not been left unattended. If cleaners leave an elevator unattended or neglect to lock off an elevator that was used for service, the guards will log the incident in their log book. If they pass by a cleaner, they may tell them of such a problem. Generally, however, the floater guards have minimal contact with the cleaners. Cleaners are, for the most part, working within tenant offices, and guard patrols do not involve walking through tenant's offices.

45. There is limited complimentary interaction between guards and Martin's cleaners in the performance of their duties. They pass information to each other, e.g., a cleaner may tell a guard where a door was left unlocked, and a guard might ask the cleaners to place "caution" signs at wet floor areas in the winter or might tell the cleaner of a spill.

46. The more regular interaction between guards and cleaners happens at the information desk, where the guard keeps the keys used by Martin's cleaners in the Talbot Centre and Dufferin Corporate Centre. Metropolitan cleaners at the Xerox Centre keep their own keys and so the guards' interaction with those cleaners is minimal (if at all existent); the Metropolitan cleaners do not have a radio in the Old Oak 2-way radio network. Martin's cleaners come to the desk and ask the guard stationed there for a particular key ring, which contains a combination of keys and access cards. Cleaners carry no Martin's employee identification and are not required to formally identify themselves, although they do wear uniforms issued by Martin's and many of them are familiar/recognizeable to the guards. The guards do not have list of Martin's employees. The cleaner signs her or his name in a "sign-out log" and the guard initials. At the end of her or his shift, the cleaner is expected to return the key ring to the desk and to sign out and the guard is expected to initial the entry and note the time. However, since the commencement of the guards' strike, the guards have not performed that initialling or notation. Both before and after the strike, the guards have not always supervised the return of cleaners' keys; this is in part because the cleaners' shifts and guards' shifts overlap, so that the guard present for the sign-out is not always the same guard present for the sign-in that is supposed to happen.

47. The majority of Martin's cleaners are on duty between 6:00 and 11:00 p.m.; about 5 cleaners are present between 7:00 and 10:00 a.m.; and there is one cleaner on duty during the day.

48. Although the guards have a record sheet that notes which areas are accessed by most (if not all) of the key rings and although most keys are identified with a luggage tag, the guards do not control or monitor the particular collection of keys or access cards on each ring. Nor do the guards control or monitor which cleaner takes which ring, nor do they keep track of the keys and access cards kept on any particular ring. The cleaner requests the ring and the guard gives it to the cleaner. The guards keep no list of cleaners' assignments to particular floors of the buildings. Cleaners may be reassigned to different floors from time to time but the guards are not informed of changes in assignments. Although cleaners obtain their keys from the security desk, they then report to a Martin's office/shop on the tenth floor where they punch in at a Martin's punch clock. If a cleaner fails to return a key ring to the desk at the end of shift, the guards will investigate to discover whether the cleaner is still on site. If the cleaner is no longer on site, the guard will simply make a log entry noting that the key ring was not returned. That problem would typically be followed up by the guards' supervisor who would contact the cleaners' supervisor without any further involvement of the guards or Old Oak generally.

49. Jim Reilly (the guards' manager) admitted that there was no way for guards to determine whether cleaners had swapped or altered key rings, nor to determine where cleaners were during their shifts. He further admitted that guards could not know with certainty the areas to which each cleaner might have access by means of key rings provided by the guards. As he summarized, "the system isn't perfect; this isn't a penal institution".

50. Guards have no role or business in checking to see where cleaners are working, or ensuring that they are in certain areas and not in other areas, or performing whatever tasks they are supposed to be doing. Moreover, guards have no special role requiring them to check to ensure that cleaners are not doing certain things, except as they might randomly interact with them or as they might be required to do in checking door and elevator security. For example, a guard stopped a Martin's cleaner who wanted access through a particular door for which the cleaner did not have a key or access card; the guard warned the cleaner that this would amount to unauthorized access. In another instance, a guard observed a cleaner 'jimmying' a door open, and stopped the attempt; the incident was logged.

51. As their manager admitted, the guards' monitoring duties in respect of the Martin's cleaners are the same as in respect of Old Oak tenants and tenant employees. With any of those classes of persons, plus any other person visiting the site, guards would be empowered to stop and search a person if something were obviously amiss. Both guards and their manager gave the example of someone inexplicably leaving the building with a computer. However, this is not a posted rule that guards are asked to enforce. Nor has there ever been an actual incident that has led a guard to exercise this supposed authority to stop and search a person.

52. The guard on desk duty has other duties, of course, beyond his dealings with the Martin's cleaners. There are still the security cameras to be monitored and the phones to answer, both for emergencies and for routine inquiries for information, maintenance or security assistance. A sign-in sheet is kept and tenants and visitors are directed to sign-in before going up elevators after hours, making note of their name, company and time of entry; however, most people apparently ignore the direction and the guards are not expected and do not block their access. Although anyone entering the floors of the towers after business hours must have an access card, guards have discretionary authority to permit entry even where a person does not have the card. As the guards' manager Jim Reilly put it guards can use common sense; if the guard is familiar with person who have forgotten access cards or keys in an office on one of the floors, the guard may give them access to their office. In addition, guards will enforce requests by particular tenants to block attempts by certain persons to access their premises. For instance, a tenant who has just dismissed an employee may ask that the guards prohibit that employee from entering the tenant's premises.

53. The third shift, or 'night shift', at the downtown complex consists of 2 guards. They have a quieter time than the afternoon shift. Although there is some overlap with the Martin's cleaners, most cleaning staff have left by the time the night guards are on duty. No other cleaners arrive during the night shift of guards (or at least none other who come to the desk to obtain a key ring), although some complete their duties and are expected to hand in and sign out their keys with the night guard at the desk. The balance of the night guards' duties are similar to those of the desk and patrol guards of the afternoon shift. The night guards have the additional lock-up check in the retail area of the mall that is occupied by a bar that closes in the early hours of the morning; they also patrol to ensure that the bar's patrons leave the retail mall area.

54. Both parties in this case offered extensive references to the log book kept by guards at the Talbot Centre desk. Both the guards and their manager understand the 'cover your ass' purpose (as they put it) of the log book. The log stands as proof that guards have done whatever they were able to do in any specific incident. It gives a detailed account of everything done, every area patrolled, anything found, and any course of action taken. If a tenant complains about guards' failure to deal with a matter, the log should show exactly what other matters guards were engaged in at the time. (The patrol guard uses an access card for a similar purpose: the guard 'swipes' an invalid access card at various points in his rounds, which records the time of an unsuccessful attempt to enter a particular door, thus proving the guard's presence at the place and time.) The log book is also used to record phone calls from tenants, radio calls from others on the 2-way radio system, breakage or damage, removal of transients, and anything out of the ordinary. Each shift of guards uses it to inform the next shift of things that happened on the previous shift.

55. Guards log any breach of security, including any failure by Martin's cleaners to lock off elevators used for service. Similarly, guards will log instances in which a cleaner fails to lock a door at end of shift, or leaves a door open while on a cigarette break (and according to the guards' manager, tenant areas are often found unlocked). Guards have also logged incidents where cleaners have allowed persons access to the building after business hours. In one instance, a cleaner allowed someone without an access card into the building; the guard logged it, as well as a comment that Martin's cleaners should be reminded of correct building access procedures. In such matters, the guard's only business is to record his finding. Jim Reilly, their manager, reviews the log on a daily or weekly basis and if he sees record of such security breaches by cleaners he will follow up with Greg Martin of Martin's cleaners. Guards have no further involvement. Apart from security breaches by the cleaners, the guards also log any complaint from a tenant, e.g., that cleaners are smoking on the premises, or engaging in petty pilfering of munchies - and in such cases, the guards may go to the floor to investigate. However, there were no examples of guards involvement in theft by cleaners. Guards also log any damage caused by cleaners, e.g., there were several notations of damage caused by a large and apparently unwieldy cleaning machine.

56. Guards have never been required to give evidence in any investigation or proceeding involving cleaners. It remains a possibility, however.

57. There has been only one major breach of security by Martin's cleaners, involving ongoing theft. In that case, Bell Canada through its own in-house security reported to Jim Reilly that they suspected a problem. However, no one - including Old Oak's guards - was free from suspicion initially. Eventually, Jim Reilly told guards to keep watch for anything unusual. However, Old Oak guards were assigned no particular role in investigating the problem (although they were interested in such a role). Bell's in-house security picked up the thief using their own surveillance, without any assistance from the Old Oak guards.

* * *

58. Old Oak guards in the Labourers' bargaining unit also work at two other sites.

59. At the Meadowbrook industrial park there are 160-180 units in a 'strip mall'. A single guard is present during two shifts (nights between 9:00 p.m. - 6:00 a.m. and days between 7:00 a.m. - 4:00 p.m.). The guard patrols the large mall area in a patrol car throughout the shift. His only duty is to watch the grounds for anything unusual. There is no interaction with any employees of any tenants, and guards are not aware of any cleaners employed by or under contract to tenants or Old Oak. Guards have no keys to the premises (except to a washroom) and have no role in monitoring the comings and goings of tenants or employees.

60. At Old Oak's residential complex, a single guard is employed on a night shift from about 7:00 or 8:00 p.m. to 4:00 or 5:00 a.m. The guard is stationed in a cubicle at the entrance to the parking area for the complex. In that small guardhouse are television monitors displaying the view from cameras at the entrances to the buildings and the parking areas. Although there are other Old Oak employees (building superintendents, maintenance employees), the guard has no interaction with them except to pass on requests from tenants for maintenance; in an emergency the guard might phone someone to deal with a maintenance problem. The guard does 'walk-about' to check the building lobbies and interiors and to check the parking lots for any damage or any unusual activity. The guard also escorts people to cars in the parkades or to a nearby bus stop.

* * *

61. There is no evidence that striking Old Oak guards have stopped or attempted to stop Martin's cleaners from crossing the picket line to work. Indeed, there is no evidence that the Labourers have prevented or attempted to prevent any person from crossing their (occasional) picket line to enter Old Oak premises. According to the Business Manager of Local 1059, Jim MacKinnon, the Labourers have made no effort to encourage Martin's cleaners (who are members of the Labourers' union) to support the guards' strike in any way. MacKinnon recalls only that near the start of the strike he received a call from a Martin's cleaner who asked what her obligations or duties were in the circumstances; MacKinnon told her that she must honour her obligations to work in accordance with her union's collective agreement with Martin's. Apart from that call, there was no clear evidence that Martin's cleaners supported or were concerned about supporting the guards' strike. MacKinnon admitted that it was possible that off-duty cleaners participated in picket support.

62. There was some further evidence regarding the actions of one Metropolitan cleaner on December 11, 1995. Metropolitan is the cleaning contractor at the Xerox building owned by Old Oak. As noted above, Metropolitan's cleaner employees are represented by the Labourers. On December 11 a massive demonstration - a 'Day of Protest' organized by the broader labour movement as part of a larger protest against the government - involving thousands of persons occurred in London. On that morning a cleaner employed by Metropolitan called his employer to advise that he would not be reporting for his shift that day because he was taking part in the Day of Protest. (Metropolitan did not discipline him for the absence.) Later on that morning a group of protesters including members of the Labourers' Local 1059 as well as busloads of members of other unions gathered at the front of the Xerox building. That group included the Metropolitan cleaner who had failed to report for work. Not long after that group formed, the striking Old Oak guards moved their picket line to the entrance of the Xerox building parking garage, about 80 feet from the building entrance where the other group gathered. Over the course of the next few hours, the two groups intermingled and became one large protest, ending at 9:30 a.m.

* * *

63. Apart from the circumstances of guard work at Old Oak, the Board heard some evidence regarding guards in the few other guards bargaining units represented by the Labourers.

64. The Labourers represent two bargaining units of guards employed by Stinson at two separate locations. One of the collective agreements is in respect of Stinson guards at a Cuddy Foods factory. The guards there monitor Cuddy employees when they enter and exit the plant. They also monitor the plant when it is operating at reduced capacity to ensure that Cuddy employees are not stealing Cuddy property. On night shifts, the plant is occupied predominantly by Cuddy maintenance staff and by the cleaners employed by Dom Clean Building Cleaners ("Dom Clean"). The Labourers also represent the Dom Clean cleaners who clean offices at the Cuddy plant. On the night shift, the Stinson guards are charged with monitoring the activities of maintenance workers and cleaners. This includes logging of any infractions in a log book.

65. According to Jim MacKinnon, Stinson expressed some concern about the interaction of its guard staff with Dom Clean cleaners who were fellow union members, and also about the possibility that guards might refuse to cross a picket line of striking plant employees (who are represented by the UFCW). It became the subject of collective bargaining and resulted in the following provision of the parties' collective agreement:

7.03 The Union and its members covered by this agreement agrees that a strike or picketing by another Union and or members of the Union working under other agreements will not alter or affect an employee's responsibility under this Collective Agreement to report for work, and complete his or her shift.

This issue was never the subject of discussions or collective bargaining between Old Oak and the Labourers. Old Oak never raised a similar concern. (For detailed discussion of this point, see the decision below regarding the complaint of bad faith bargaining.)

66. When the UFCW bargaining unit at Cuddy Foods last engaged in strike action including picketing, Labourers' members working as security guards for Stinson and as cleaners for Dom Clean crossed the UFCW picket line and performed their duties. There was also a strike in 1995 by construction workers represented by the Labourers who were performing curb and gutter and sidewalk work outside the Cuddy plant. Labourers' members employed as Stinson guards or Dom Clean cleaners did not join any picket line of construction workers nor did they refuse to cross any picket line to enter the Cuddy plant to perform their duties.

67. The Labourers represent a second bargaining unit of Stinson employees at a downtown London building known as the City Centre. The Labourers originally obtained bargaining rights at that location when the guards were employed directly by the building manager, City Centre Management Inc. The Labourers' collective agreement dealt with the contracting out of bargaining unit work in the following provision:

2.05 . . .

Should the Employer contract out any or all of the work performed by bargaining unit employees, the Employer agrees as follows:

- (a) Such new Employer (contractor), contracting or performing such work, shall be required to enter into and be bound to the terms and conditions of this agreement as if an original party thereto.

- (b) Employees performing such work shall be hired by the Contractor and be covered by all the terms and conditions of this Agreement. All seniority and conditions of employment applicable to such employees, shall also be assumed by the Contractor.
- (c) Articles 18 and 19 [Job Posting and Seniority] shall be applied by the Employer and the Contractor as if their employees were still employed by the Employer. This shall only be applicable to the employees in the attached Appendix "B".

When City Centre contracted out its security services in July of 1995, the contractor was Stinson. Stinson advised the Labourers that it agreed to be bound by the Labourers' collective agreement with City Centre "as per Article 2.05 of the collective agreement".

68. At City Centre, the Labourers also represent cleaners employed by Martin's and maintenance staff employed by City Centre, under separate collective agreements. The guards and maintenance employees engaged in a strike for their first collective agreement (before City Centre contracted out the work to Stinson, guards and maintenance employees were within a single bargaining unit). During that strike, fellow Labourers' union members employed as cleaners by Martin's performed their duties as usual.

69. Stinson guards at the City Centre are stationed at a kiosk with security camera television monitors. Like Old Oak guards, they keep a log to record tenants and contractors who enter the building after business hours. They patrol the building and its parking garage. Guards 'monitor' cleaners and maintenance staff only in the sense that they come into random contact with them while on 'rounds'.

* * *

70. Both parties took the position that evidence of guards' work in entirely unrelated workplaces was relevant to the determination of Old Oak's allegation of conflict of interest. Given this shared view, I decided the evidence might arguably be relevant to their case. Although the evidence offered was lengthy and included great detail I have found that much of it is neither material nor relevant to the case before me.

71. In essence, it is not the business of this panel to determine whether CAW guards at auto plants are in a position of conflict of interest where their duties include monitoring CAW members employed inside the plant; and the same is true of the various other workplaces covered in the evidence. The evidence is useful to a degree: it puts the duties of Old Oak guards in the larger context of security guard work as it is performed variously throughout the province in a variety of settings.

72. This 'extrinsic' evidence also helps to provide context for the interpretation of the new provisions of Bill 7. Obviously, the circumstances of Old Oak guards are not necessarily representative of the greater variety of security services that the legislation governs.

73. The Labourers offered the evidence of Alexander Petutin, a security guard employed by Pinkerton's at the General Motors ("GM") plants in St. Catharines. When Petutin began work as a guard at that location, GM provided 'in-house' security services, i.e., through its own employees. Although its plant workers have long been CAW members, the guards were for a long time represented by the UPGWA during the time when GM employed them directly. After Bill 40 changed the rules regarding unionization of guards, the guards decided to seek representation from a union other than the UPGWA. When GM contracted out (across Ontario) security services to Pinkerton's, the CAW was certified to represent Pinkerton's guards. Pinkerton's and the CAW engage in "master bargaining" for all of the CAW units at GM plants where Pinkerton's employs guards.

74. At GM plants, the Pinkertons guards' primary function is to control persons' access to the plants. All persons must stop at guardhouse stations and present identification to guards. Guards are authorized to stop and search people and vehicles, and do so. At the end of each shift (of GM production), GM production employees must present their lunch boxes and any parcels to guards for inspection in order to ensure against theft. Guards also patrol the plant during production workers' shifts. Guards monitor production employees' movements to ensure that only authorized persons access certain sensitive areas. Guards investigate and conduct surveillance of production workers suspected of theft or other illegal activity; guards will search suspects on their exit from the plant.

75. Petutin is active in the CAW Local 199 that represents both GM production workers and the Pinkertons guards. He explained that he led the guards move to the CAW from the UPGWA because the guards wanted a union with greater resources and more power. It was also clear that Petutin's view was that the guards could rely on the combined strength of all of Local 199 in battling any attempt that Pinkertons might make to terminate CAW bargaining rights for guards under the Bill 7 transitional provisions; he actively seeks general union support for issues (like labour law changes) that affect guards.

76. No strike has occurred in either the production workers' or guards' bargaining unit since each has been represented by the same trade union. Petutin claims that nothing in the union constitution would require (and the union would not encourage) employees of either bargaining unit to support the other by refusing to cross a picket line in the event of a strike. The guards agreement with Pinkerton contains language to address the employer's concern that guards not show favouritism to fellow union members (somewhat akin to the provision MacKinnon negotiated in respect of Labourers guards employed by Stinson, mentioned above).

77. All members of Local 199 share a union hall and take part in common meetings (e.g., membership business, training, social functions).

78. Old Oak called Ron Flescher, a Pinkerton's supervisor at the Oshawa General Motors location. In general, his evidence confirmed Petutin's evidence of the nature of guard duties at GM plants. Flescher also described how guards occasionally plan and execute surveillance and arrest procedures involving production workers using alcohol or illegal drugs on plant premises.

79. Flescher was concerned that CAW guards showed favouritism to CAW production workers. In one instance, a guard was surrounded by an angry crowd of production workers trying to leave the plant; in filing a later report, guards were unable to identify any particular production worker. (There was no evidence that guards recognize or should recognize a certain number of faces in a plant that employs thousands of production workers.) In another instance, guards reported that there were no witnesses to provide evidence in respect of a production worker drinking on the job. None of his examples raised anything more certain than Flescher's own suspicions, regardless of the union affiliation of those involved.

80. Flescher also produced a posting that he found on the guards' bulletin board in the workplace and that he claimed was union propaganda. Referring to an "Alert Line" established by the employer to receive calls on suspicious activity, the poster poked fun at 'ratting' on fellow employees. Flescher claimed it was produced by production worker union members.

81. Flescher also testified about his previous guard experience at Rio Algam. He was employed there for 9 years; in his last year, the guards became unionized, represented by the same union that represented general employees (the Steelworkers). Flescher said that, after unionization, no guard other than himself reported any incident of theft by the general employees, despite the fact that there were

usually a number of thefts each year. Flescher said that other guards told him that they would not cause other employees to lose their jobs.

82. The Labourers also presented evidence through Stewart Deans, a representative of the United Steelworkers of America. Deans is responsible for the Steelworkers' organizing and collective bargaining efforts in respect of guards in Ontario. Like Petutin, he had been a leader of a guards-only union - the Canadian Guards Association (the "CGA"). After the introduction of Bill 40, the CGA merged with the Steelworkers. The Steelworkers now represent about 5000 guards working for various employers in Ontario. The union has established a division (the Ontario Security Officers' Council) to manage Steelworkers' business in respect of security guards. Guard members of the Steelworkers enjoy all the same benefits (e.g., strike fund, training, legal representation) that non-guard members enjoy. Guards also participate in certain levels of union government and take part in union political action.

83. Old Oak called Paul Rivenbank, the President and Chief Executive Officer of Group 4 CPS, a security services contractor employing guards at more than 400 sites in Ontario. Rivenbank has an extensive background in management in the security industry. Group 4 CPS has collective bargaining relationships with 8 unions that represent its guards in various bargaining units. Although I received Rivenbank's evidence, I do not find that his opinion is helpful (in the suggested way of expert evidence) in answering the very question that the Board must answer, i.e., what constitutes conflict of interest.

84. Rivenbank testified that he believed there was conflict of interest where "the guard and the guarded" were in the same union. He believed that there would be pressure to avoid reporting infractions by a fellow union member. He suggested the possibility of intimidation or coercion by fellow union members. He also believed that the same conflict existed where the guard and the guarded were family members. He admitted that favouritism was also a concern if the guard and the guarded were in the same church, or had children in the same school, or happened to be friends. He also said that favouritism is generally difficult to detect. When asked about favouritism engendered by unionization, Rivenbank was only concerned about guards in the same union as those whom they monitor; he saw no reason for concern where the guard and the guarded were in different unions. After passage of Bill 40, Rivenbank says that his company lost 140 clients because of client concern of potential conflict of interest caused by unionized guards.

(ii) Decision

85. Old Oak's application for termination of the Labourers' bargaining rights is made pursuant to the transitional provisions of Bill 7.

86. Of Bill 7's transitional provisions, section 8 reads as follows:

8. (1) This section applies with respect to bargaining units that include, on the day this section comes into force, guards who monitor other employees or who protect the property of an employer.

(2) Within 90 days after this section comes into force, an employer may apply to the Ontario Labour Relations Board for a declaration that a trade union no longer represents the guards in a bargaining unit,

- (a) if the trade union admits to membership persons who are not guards; or
- (b) if the trade union is chartered by or affiliated with an organization that admits to membership persons who are not guards.

(3) The Board shall issue the declaration unless the trade union satisfies the Board that no conflict of interest would result from the trade union continuing to represent the guards.

(4) Within 90 days after this section comes into force, an employer may apply to the Ontario Labour Relations Board for a declaration that a trade union no longer represents the guards in a bargaining unit that includes other employees.

(5) The Board shall issue the declaration unless the trade union satisfies the Board that no conflict of interest would result from the guards remaining in the bargaining unit.

(6) The Board shall consider the factors set out in subsection 14(5) of the new Act in determining whether a conflict of interest would result for the purposes of subsection (3) or (5).

(7) Upon the issuance of a declaration under this section, the collective agreement, if any ceases to apply with respect to the guards.

87. Section 14 of the *Labour Relations Act, 1995* provides as follows:

14. (1) This section applies with respect to guards who monitor other employees or who protect the property of an employer.

(2) Unless the employer notifies the Board that it objects, a trade union that admits to membership persons who are not guards or that is chartered by or affiliated with an organization that does so may be certified as the bargaining agent for a bargaining unit composed solely of guards.

(3) Unless the employer notifies the Board that it objects, a bargaining unit may include guards and persons who are not guards.

(4) If the employer objects, the trade union must satisfy the Board that no conflict of interest would result from the trade union becoming the bargaining agent or from including persons other than guards in the bargaining unit.

(5) The Board shall consider the following factors in determining whether a conflict of interest would result:

1. The extent of the guards' duties monitoring other employees of their employer or protecting their employer's property.
2. Any other duties or responsibilities of the guards that might give rise to a conflict of interest.
3. Such other factors as the Board considers relevant.

(6) If the Board is satisfied that no conflict of interest would result, the Board may certify the trade union to represent the bargaining unit.

88. Under the old Act (or Bill 40), there were no restrictions on the type of trade union that could represent guards. However, there were rules regarding the appropriateness of bargaining units that contained guards. Section 6 of the old Act directed the Board to determine the appropriateness of the bargaining unit in an application for certification and contained the following specific provisions in respect of guards:

(6) A bargaining unit consisting solely of guards who monitor other employees shall be deemed by the Board to be a unit of employees appropriate for collective bargaining,

- (a) if the applicant trade union or the employer requests that the Board do so; and
- (b) if the Board is satisfied that the monitoring of other employees would give rise to a conflict of interest if the guards were included in a bargaining unit with the employees they monitor.

(7) The Board may include other guards in the bargaining unit described in subsection (6).

89. Prior to Bill 40, the Act permitted only guards-only unions to represent guards, and prohibited the mixture of guards and non-guards in the same bargaining unit. Section 12 of the pre-Bill 40 Act read as follows:

12. The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards, and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or affiliated, directly or indirectly with an organization that admits to membership persons other than guards.

The provision is framed in the form of *prohibitions* that apply with respect to representation of guards.

90. What is a "guard"? The term has not been legislatively defined in any of the statutory treatments of guards. Under the long-standing provisions of the pre-Bill 40 law with respect to guards (which existed essentially unchanged from 1950 until 1993), the Board's case law was limited to consideration of whether employees were "guards" for the purposes of section 12, i.e., "employed as a guard to protect the property of an employer". This meant analysis of guards' duties to determine "the character and degree of monitorial and admonitory authority" in respect of their employer's other employees. This approach was based on the presumption of a legislative intent to prevent any alliance between guards and other employees that might compromise guards' loyalty to their employer or the special duty to protect the employer's property.

91. The impermissible conflict of interest was rooted in the conflict of loyalties that would face unionized guards. The Board tailored its interpretation of the meaning of "guard" to fit its view of the purposes of section 12:

... to be considered guards as contemplated by the legislation their duties must be of such a nature that inclusion in a bargaining unit with non-guard employees would confront them with a real and serious conflict between their special duties to their employer to protect his property and their expected loyalty to fellow bargaining unit employees. (See *Geo. A. Crain & Sons Ltd. et al.*, (1963) 63 CALL 1205).

In assessing the evidence of particular guards' duties, the Board was prepared to consider both actual or potential conflict of interest. In at least one case, the Board found that conflict of interest existed where guards' monitorial authority permitted them the power to search the belongings of other employees, even if such power had not been exercised. See *Imperial Leaf Tobacco Company of Canada Limited*, [1969] ORB Rep. Feb. 1168.

92. In considering cases under former section 12, the Board expounded upon its responsibility to take a balanced view in assessing the potential for conflict of interest:

... Since the effect of section 11 [later section 12] is to place limits on what constitutes an appropriate bargaining unit and on an employee's free choice of what trade union will represent him in collective bargaining, this test is a reasonable balancing of those restrictions with the need to protect an employer from the conflict posed by a guard's duty to protect that employer's property and any loyalty that the guard might feel towards other employees of the employer.

See *Wells Fargo, Armcar Inc.*, [1981] OLRB Rep. July 1046, upheld *Wells Fargo Armcar Inc.* (1982), 36 O.R. (2d) 361 (Div. Ct.).

93. The Legislature fundamentally altered the rules governing guards in the enactment of the amendments in Bill 40. It removed the absolute prohibition on the inclusion of guards in a bargaining unit with other employees. It also removed the restriction on the ability of trade unions to represent guards, opening the right to unions that were not guards-only unions. Section 6(6) directed the Board

to consider only whether a conflict of interest would arise if guards were included in a unit with employees whom they monitored. As the Board commented, the choice of statutory language indicated that the Act had

... specifically adopted and codified the Board's conflict of interest test, making it clear that whatever restrictions remain in respect of guards and collective bargaining will apply only to guards whose monitoring of other employees would give rise to a conflict of interest. In this respect although the restrictions have been significantly altered, they would appear to apply to the same class of persons.

See *The Municipality of Metropolitan Toronto*, [1994] OLRB Rep. June 795. In a later decision in the same proceedings, the Board commented that "section 6(6) generally requires separate bargaining units for guards" (see the unreported decision dated February 13, 1995 in *The Municipality of Metropolitan Toronto*, Board File Nos. 3730-93-R; 3731-93-R.)

94. Before interpreting the language of the Act as it now reads, I should highlight some distinctions between the pre-Bill 40 guards provision and those which followed in the Act as amended by Bill 40. As the Board commented in the variety of cases under section 12 of the pre-Bill 40 Act, the statute did not define the term "guard". However, old section 12 did modify the term to some extent by referring to persons employed as guards "*to protect the property of an employer*". It was the Board that added through its jurisprudence the notion that the provision affected only guards that "*monitored*" other employees. Only from this monitorial authority did the Board envision that a conflict of interest might arise.

95. Bill 40's section 6(6) clearly took heed of the oft-repeated language of the Board's case law. In deeming the appropriateness of a guards-only unit, section 6(6) adopted some of the Board's parlance. The statutory reference was to "guards *who monitor other employees*". The Act directed the Board to find as appropriate a unit of only guards if "*the monitoring of other employees would give rise to a conflict of interest*". Reflecting the experience of the Board, the statute envisioned that a certain degree of monitorial authority would give rise to a conflict of interest. If the conflict of interest existed, the statute required that guards be kept in a unit apart from any other employees. As the Board commented in the June, 1994 decision in *The Municipality of Metropolitan Toronto, supra*, the Act made no rules in respect of the selection of bargaining agents even in the event that the Board found that a conflict of interest existed between guards and employees who were fellow union members. As that panel of the Board put it, at para. 20:

... We accept the employer's argument that a resulting complete elimination of any conflict of interest is not a prerequisite to the application of section 6(6). Rather, the legislature, in its wisdom, has determined that where a conflict of interest exists the appropriate response is not to limit a guard's selection of bargaining agent, but rather to simply deem a bargaining unit consisting solely of guards to be appropriate for collective bargaining. It is not for the Board to determine in any particular case whether the resulting "guards only" unit will eliminate or seriously reduce the potential for conflict of interest.

96. Taking into account the perceived codification of Board jurisprudence, the Board essentially found that the "guards-only" deemed unit rule must apply wherever the Board found the degree of monitorial authority that raised a conflict of interest of the sort described by the Board under former section 12.

97. The "deeming language" used in section 6(6) was similar to pre-existing language from section 6 of the pre-Bill 40 Act. As with those older provisions concerning appropriate bargaining units for members of a craft, engineers and dependent contractors, the Bill 40 provisions used particular language that the Board had long construed as constituting a legislative direction to find certain bargaining unit configurations appropriate. For guards, the statute indicated that guards-only units

“shall be deemed by the Board to be a unit of employees appropriate for collective bargaining”. In this way, the statute indicated that the Legislature started with the proposition that certain guards must be kept in units distinct from other employees.

98. I should also note that Bill 40’s section 6(6) contained no reference to a guard’s duty “to protect the property of an employer”. That modifying phrase from the old section 12 had been dropped.

99. Bill 7 fundamentally alters yet again the statutory treatment of guards and brings a new arrangement of some of the old statutory phrases. The new Act approaches the guards issue differently than either Bill 40 or old section 12 of the pre-Bill 40 Act.

100. Although the instant case is an application pursuant to section 8 of the transitional provisions of Bill 7, section 8 directs the Board to consider the factors set out in subsection 14(5) when determining whether a conflict of interest would result. Before turning to the specific effect of the transitional provisions, I will consider the meaning of section 14 of the new Act.

101. In defining the term “guard”, section 14 borrows from both of its predecessor provisions. Instead of modifying the term “guards” as old section 12 did (“a guard to protect the property of an employer”) or as Bill 40’s section 6(6) did (“guards who monitor other employees”), it combines the two approaches. Subsection 14(1), which sets the context within which the new rules apply, provides that the new section applies to “guards who monitor other employees *or* who monitor the property of an employer”.

102. To put the new provisions in statutory context, I should note that the new Act continues some of the long-standing provisions regarding appropriate bargaining units. The sections regarding units of craft members, engineers and dependent contractors are now found in subsections 9(3)-(5) of the new Act and the format of ‘deemed appropriate bargaining units’ remains. Guards, in contrast, are now removed from that context. The statutory location of the new provisions is more similar to that of old section 12 of the pre-Bill 40 Act. Like old section 12, new section 14 is a free-standing provision placed in that part of the Act that deals with certification. And like old section 12 it deals not only with permissible bargaining unit structure but also with restrictions on the right of certain trade unions to be certified to represent guards.

103. Yet it is not a return to the formula of old section 12. Old section 12 was a strict prohibition. Section 14 prohibits nothing. It is *permissive* in its provision that certain configurations of guards bargaining units and bargaining agents “*may*” exist. A union “*may*” be certified to represent guards even if the union is not a guards-only union. Guards “*may*” be included in units with other employees. Although the new provisions are permissive, the severe strictures apply as soon as an employer registers an objection. If the proposed bargaining agent or bargaining unit is to survive, the union must satisfy the Board that *no* conflict of interest would result from its proposal. If a conflict of interest would result, the trade union that represents persons who are not guards simply cannot represent the guards whom it proposes to represent.

104. The ‘permissive’ as opposed to ‘mandatory’ structure also distinguishes the new law from the Bill 40 provision. Subsection 6(6) of the old Act *mandated* a guards-only bargaining unit in certain circumstances, i.e., where (a) the employer or union so requested, and (b) the inclusion of guards with employees whom they monitored would give rise to a “conflict of interest”.

105. The manner in which the new law uses the phrase “conflict of interest” also distinguishes it from its predecessor provisions. The crux of section 14 is a code of guidelines that the Board must consider when assessing whether a “conflict of interest” exists.

106. Under Bill 40, the Board assessed whether “the monitoring of employees would give rise to a conflict of interest”. Without statutory definition or restriction on the meaning of those phrases, the Board resorted to its earlier case law and noted its view that the Legislature had in essence codified that case law. The focus was the monitorial authority of the guards, just as it had been under the Board’s interpretation of old section 12. Under the new Act, the focus shifts slightly. Now, the monitorial authority of the guards is just one of a number of factors that the Board must assess in judging whether a conflict of interest exists.

107. By mandating that the Board consider certain factors in determining whether a conflict of interest would result, the Act suggests that there are a variety of things other than guards’ monitorial authority that might affect the determination. The list of factors in subsection 14(5) encompasses: (i) guards’ duties monitoring other employees; (ii) guards’ duties protecting their employer’s property, (iii) other duties and responsibilities; (iv) other factors the Board considers relevant. The last item on the list indicates the generality of the inquiry, i.e., that assessment of conflict of interest is no longer rooted merely in consideration of “the monitoring of other employees”.

108. In practical terms, this means that the determination of the existence of a conflict of interest may now rest upon something other than a simple finding such as the guards’ authority to search the belongings of other employees. No such simple line is drawn in the statutory guidelines for determination of whether conflict of interest would result. Indeed, it is at least conceivable that the Board might find that other factors outweigh the effect of monitorial authority.

109. Even on that one factor, i.e., the guard’s monitorial authority, the new Act has significantly altered the assessment. In case law under old section 12 and under the language of Bill 40’s section 6(6), the Board simply looked for the existence of “monitorial” authority. Bill 7’s language requires the Board to assess “the *extent* of the guard’s duties monitoring other employees of their employer”. It suggests a gradation in monitorial duties, and that some degree of monitorial duties may give rise to a conflict of interest while some may not. Counsel for the Labourers argued that “monitoring” duties must include, at a minimum, a role in admonishment or warning of those monitored. While this may reflect one of the ‘degrees’ of monitorial authority contemplated by paragraph 14(5)1, I am not convinced that it is the only sort contemplated in the new scheme. Without doubt, a role in admonishing those whom one guards amounts to a greater degree of monitorial authority.

110. The notion of a scale of degrees of monitorial responsibility is not new. It reflects the reality of a wide range of guarded properties, from low security to high security. For example, in *Windsor Casino Limited*, [1995] OLRB Rep. Feb. 206, the Board distinguished between the duties of security guards and surveillance officers in a casino. While security guards had a merely incidental duty to monitor surveillance officers (e.g., while entering or exiting the building), a fundamental duty of the surveillance officers was to monitor other employees (including security guards). Although there had been no dispute between the parties in that case regarding the separation of the security staff unit from the unit of other casino employees, the employer sought a separate unit for surveillance staff. The Board highlighted the “unique responsibility” of surveillance officers to their employer. Since the monitoring of security guards was an essential part of the security officers’ work, a conflict of interest was inevitable.

111. In determining whether a “conflict of interest would result” in the new statutory context, the Board’s original analysis in *Geo. A. Crain & Sons Ltd.* remains helpful. Unacceptable conflict arises where there is a “real and serious” conflict of loyalties. Though the new provisions point to a broader range of factors to be considered and to differing results across the spectrum of guarding authority, the Board ultimately must still decide whether it sees “conflict of interest”. And the determination of “conflict of interest” remains rooted in the unique labour relations context of an Act which governs the

often competing interests of employers and unions. Where an employer contends that a “conflict of interest” would result from the representation of its guard employees by a trade union that admits to membership persons who are not guards, the essential question is this: does the guards’ relationship to such a union undermine the employer’s reliance on the guards?

112. While all of these principles and considerations apply inasmuch as subsection 14(5) governs the case before me, the case must also be judged in its context as an application under the transitional provisions in section 8 of Bill 7.

113. Section 8 of the transitional provisions of Bill 7 provided a 90-day ‘open period’ within which an employer could apply for a Board declaration to terminate bargaining rights held by unions that are not guards-only unions, or for a declaration removing guards from a ‘mixed’ bargaining unit. In Old Oak’s case, this led to an application pursuant to subsection 8(3). That section *requires* the Board to issue the declaration unless the Labourers satisfy the Board that “no conflict of interest would result from the trade union *continuing* to represent guards”.

114. As in the analysis of section 14 of the Act, it is helpful to note what section 8 of the transitional provisions does *not* say or require, especially in contrast with other transitional provisions. Section 8 does not automatically terminate established bargaining rights in the way that section 7 of the transitional provisions does. Nor does it provide that such rights will be terminated unless the parties agree otherwise, as in section 6 of the transitional provisions.

115. Unlike professionals’ rights or combined bargaining unit structures, guards’ representation rights and bargaining structures fixed under Bill 40 remain permissible and enforceable under the new Act *unless* an affected party acted within 90 days of November 10, 1995. And even if it made its application to the Board, section 8 envisages that the Board might find that the continuation of pre-existing structures is appropriate. In the words of subsection 8(3), this can happen where the union “satisfies the Board that no conflict of interest would result for the trade union *continuing* to represent the guards”.

116. An application under the transitional provision in section 8 involves workplaces that have had experience (started under Bill 40) with unionized guards. In Old Oak’s case, this means that there is evidence of *actual* interaction between unionized guards and with fellow union members. In the context of an application under the transitional provisions where the test is directed at the appropriateness of *continuation* of pre-existing bargaining rights, the Board should consider the actual experience of the workplace. Apart from any interpretation of the wording of section 8, the parties’ experience is a relevant factor that should be considered under paragraph 14(5)1.

* * *

117. As noted earlier, there was no question that the Labourers’ union admits to membership persons who are not guards, thus making it susceptible to an application under subsection 8(2)(b) of Bill 7’s transitional provisions. Further, there was no question that Old Oak had made timely application for termination of the Labourers’ bargaining rights within the strictures of those provisions. The parties did not focus argument on whether a particular party had discharged any onus; the issue litigated was whether conflict of interest would result from the Labourers continuing to represent Old Oak guards.

118. Subsection 8(6) requires the Board to consider the factors set out in subsection 14(5) of the Act:

1. The extent of the guards’ duties monitoring other employees of their employer or protecting their employer’s property.

2. Any other duties or responsibilities of the guards that might give rise to a conflict of interest.
3. Such other factors as the Board considers relevant.

As noted earlier, Old Oak does *not* contend that the guards' duties include monitoring other employees of Old Oak, thus obviating the relevance of that factor in paragraph 1 of subsection 14(5).

119. Old Oak contends that the factors contemplated within each of the 3 paragraphs in subsection 14(5) lead to determination that a conflict of interest would result. In particular, the employer points to:

1. The guards' duties "protecting their employer's property", contemplated by paragraph 1 of the provision;
2. The guards' duties monitoring the employees of Old Oak's subcontractor (the Martin's cleaners and Metropolitan cleaners who are fellow members of the Labourers' union), and monitoring all other persons present on Old Oak properties, contemplated by the reference in paragraph 2 to "any other duties or responsibilities of the guards that might give rise to a conflict of interest";
3. The guards' interaction with fellow union members, contemplated by the reference to "such other factors as the Board considers relevant" in paragraph 3.

120. As the parties acknowledged, this case is not about any guards' duties monitoring employees of Old Oak. This case is primarily about the extent of guards' duties monitoring Martin's cleaners in downtown buildings. Although the Labourers also represent Metropolitan's cleaners at the Xerox building, there is essentially no interaction between the guards and those cleaners. Similarly, there are no duties or responsibilities of the guards in respect of either the industrial park or the residential complex that give rise to any suggestion of a conflict of interest.

121. In reviewing paragraph 14(5)2, Old Oak took the position that guards' duties monitoring a contractor's employees were the sort of duties contemplated in the reference to "other duties or responsibilities of the guards that might give rise to a conflict of interest". In my view, those duties may also be of the sort contemplated by the reference in paragraph 14(5)1 to "duties...protecting their employer's property". The phrase recalls the old (pre-Bill 40) section 12 reference to "guards who protect the property of an employer".

122. As under old section 12, the Board's task is "to decide what is the meaning of that term *as it occurs in the context of this statute*". (See the comments made by the Divisional Court in considering the Board's extrapolation of a 'conflict of interest' test from old section 12: *Wells Fargo Armcar, supra.*) Under old section 12, the Board interpreted "guard [who] protect[s] the property of an employer" to mean reference to guards who had duties monitoring other employees. In determining what the Act means by duties "protecting their employer's property" in paragraph 14(5)1 of the current Act, the Board must again look to the statutory context. Here, the phrase arises within the requirement to determine whether "conflict of interest would result" from guards' representation by a union that admitted employees other than guards. "Conflict of interest" in this context refers to the conflict between guards' special duties to their employer and their expected loyalty to fellow union members. A guard's relationship to the employer's property, in itself, is not critical. In the statutory context, what matters is the guard's duty to protect that property from intrusion by persons who may include fellow union members. Thus, paragraph 14(5)1 would appear to be broad enough to encompass guards' duties

protecting their employer's property from fellow union members, including those working for other contractors on the employer's site.

123. Whether the Board considers the relationship of Old Oak guards and Martin's cleaners under one statutory provision or the other, the parties agreed that that relationship was the central issue in the case.

124. As Old Oak acknowledged, the main duty of its guards is to observe. During day shifts, guards are not expected to control or limit general access to the downtown buildings which, after all, are commercial areas open to the public. Although the day shift guards watch for anything out of the ordinary, the 2 guards can hardly be expected to ensure against unwanted access or damage to a property as large as the downtown complex. While guards must watch for vandalism, theft, property damage, equipment failure, and fire, it can hardly be said that they are expected to prevent all of these things. The single patrol guard could not possibly manage such a task across the large area that he patrols. As for the desk guard, much of his duties consist of providing service to tenants and visitors to the buildings. Although there are surveillance cameras, enunciator panels and intercom systems to monitor, guards spend much of their time assisting visitors to the building, answering tenant inquiries, dealing with tenant parking and access cards, directing delivery persons and contractors and the like.

125. The guards' role in property protection is somewhat more intensive during the afternoon and night shifts. However, this has more to do with the fact that the commercial buildings are closed for business and thus much quieter, allowing desk guards greater opportunity to monitor the surveillance camera screens and other systems monitors and allowing patrol guards to check premises that are locked rather than wide open to the public. Although there are three guards on the afternoon shift, this does not allow for (and the employer does not appear to expect) a guard force that can prevent vandalism, theft and the rest. Guards succeed in that role to some extent because of the deterrent role served by a constant patrol; but they cannot be expected to be simultaneously aware of all happenings at all locations in the large complex. They observe what they can and investigate what is reported to them; their manager's main expectation is that guards 'log' what they have observed and anything that has been reported to them. In reviewing the parties' detailed references to the guards' duties and to their log book, I note no change in performance of guards' duties or in the sorts of occurrences that they have addressed before and after their strike. This includes reports of any damage or security violations by Martin's cleaners.

126. Given the nature of Old Oak's premises, it is not surprising that the guards' role is not as intensive as the role of guards at other sorts of workplaces. In the spectrum of "extent of duties" in property protection, the duties of Old Oak guards are far less intensive than those of guards in factories producing banknotes, or of guards employed in casinos (see *B.A. Banknote a division of Quebecor Printing Inc.*, [1994] OLRB Rep. Nov. 1484, and *Windsor Casino*, *supra.*) As Old Oak's building manager succinctly described the downtown office complex, "it isn't a penal institution". In other workplaces employers have greater reason to fear problems such as vandalism or theft. Arguably, employers have greater reason to be vigilant for conflict of interest in such circumstances.

127. Old Oak's main contention was that the guards' duties in monitoring cleaners who were fellow union members would give rise to a conflict of interest. While recognizing that part of the relationship between cleaners and guards is 'teamwork' (in that one group advises the other of problems within the other's scope of responsibility), Old Oak sought to distinguish the relationship that guards have with their employer from that which the cleaners have either with Martin's or Old Oak. Old Oak contended that guards are a higher level of employee, amounting to "managerial assistants" with a greater responsibility to their employer. Without doubt, the general nature of a guard's role (whatever the extent of his or her duties) demands a special loyalty to the employer's interests. But as a matter of

general principle I am not certain that all types of guards owe a loyalty or duty necessarily more onerous than that of all cleaners. Cleaners may have extraordinary access to secure places and may also owe a special responsibility to their employer or their employer's contractor.

128. Beyond that general point, Old Oak argued specific aspects of the relationship of Old Oak guards and Martin's cleaners. In Old Oak's contention, guards have an indirect role in discipline of cleaners because they monitor cleaners to ensure that they are not doing things that they should not be doing and because guards log incidents that could lead to discipline. Even if one characterized the guards' role in the fashion suggested by Old Oak, I am not persuaded that it results in a conflict on the facts of this case. First, I note that there were no examples of a guard report leading to discipline of cleaners, and no example of a requirement that guards testify in any forum against cleaners. Second, and more significantly, the guards' monitorial function in respect of the cleaners is far from intensive. I was not convinced that guards have any greater role in monitoring cleaners' activities than those of other persons in the buildings after business hours. While the guards may come across cleaners in the course of their patrol rounds, the same is true in respect of tenants and their guests who may be on the premises after business hours, and contractors who may be working on site. The guards perform no strict monitorial role in respect of either category of persons.

129. The evidence does not disclose that guards have some preventive role in ensuring that cleaners follow security rules. Although guards will take action where cleaners leave elevators unattended or fail to lock a tenant's doors, this occurs by chance in the midst of regular patrols. Guards have a role in ensuring that the building is secure. While cleaners might be responsible for a security breach, so might a tenant or maintenance staff. The guard has no particular duty that amounts to supervision of the cleaners. In fact, the patrol guards make no special effort to check on cleaners, despite the special access that cleaners have to the building through use of their own keys. And where guards have had problems with cleaners (e.g., allowing someone without an access card into the building after business hours), the guards have acted without hesitation as they presumably would have in the case of security breaches that did not involve a fellow union member.

130. The guards role in provision of keys to the cleaners is not one that suggests significant monitorial responsibility. While there was some dispute about the degree of care with which Old Oak and the guards monitor the keys (e.g., whether the guards have an accurate list of the premises to which each key ring gives access), it is beyond doubt a relatively lax system. Cleaners are not required to formally identify themselves when obtaining keys, and guards have no business in monitoring to ensure that the cleaner takes only keys for assigned work areas.

131. It is also important to note the sorts of duties that guards do *not* perform with respect to the cleaners. Guards do not search cleaners' lunch pails or other belongings. They do not follow or observe cleaners in the performance of cleaning duties. They do not perform surveillance or arrest of cleaners suspected of theft; on the one occasion where theft was suspected, outside security forces were used, to the consternation of at least the one Old Oak guard who testified in these proceedings. Although guards would stop a cleaner removing something that obviously ought not to be removed (e.g., a computer), they are not required to search cleaners to ensure against theft.

132. A review of the Board's case law and of the evidence presented in this case regarding other workplaces illustrates that the role of guards at Old Oak in monitoring other employees is not nearly as intensive as in other workplaces. Old Oak guards do not search cleaners upon their entrance or exit from Old Oak premises. This is not an industrial workplace with tightly secured boundaries that can only be crossed with proper identification and by subjecting oneself to personal search. Indeed, Old Oak guards hand over keys to cleaners without any requirement of identification. Of course, there is nothing inherently wrong with this system. It clearly meets the security needs of the Old Oak location;

there is no evidence of any problem with the system. The point is that some workplaces require more intensive security than Old Oak requires and that Old Oak requires a relatively low level of security.

133. On the scale of degrees of monitorial authority over a contractor's employees, Old Oak guards exercise minimal authority. Whether this factor is considered as part of the "extent of guards' duties...protecting their employer's property" (under paragraph 14(5)1) or as part of "other duties or responsibilities of the guards that might give rise to a conflict of interest", I do not find that a conflict of interest would result.

134. Both of the parties suggested a number of factors that I ought to consider pursuant to paragraph 14(5)3 ("such other factors as the Board considers relevant").

135. Old Oak reviewed the composition of Local 1059 of the Labourers' union, highlighting the fact that most of the union's 500 non-construction members - out of a total membership of 2000 - are cleaners. There are only 35-45 guard members of the union. Despite being overwhelmed in numbers by the cleaners in the non-construction portion of the union, I find little support for the proposition that the union's structure makes it likely that guards would be subject to pressure from the cleaners.

136. Even though guards' and cleaners' bargaining units are serviced by the same business representative, it appears that the union generally deals separately with its bargaining units. MacKinnon stated that the union does not ask members to support other members' picket lines. MacKinnon also stated that he prefers to call meetings of bargaining units rather than general membership meetings. Other than occasional general membership meetings, the union contacts members universally through a twice-per-year newsletter, a Christmas party and a summer barbecue. Although the union has had occasion to offer some English language courses to the entire membership, most of its training appears to be specific to the sort of work members perform. There are no political action or social committees.

137. As already noted in discussion of section 8 of the transitional provisions of Bill 7, this is a case where the *continuation* rather than *establishment* of bargaining rights is at issue. I agree with the submission of both parties that the guards' ongoing strike experience is another relevant factor to the determination of whether a conflict of interest exists. As I indicated in my review of the evidence, I found no example of guards encouraging cleaners to support their strike by refusing to cross the picket line. I found no example of a cleaner supporting the guards' picket line; as described above, I find that Mr. Totten's picketing was more likely related to the general day of protest that day in London rather than a refusal to cross the guards' picket line. Thus, the picket line has not obstructed the performance of cleaners' work.

138. More significant is the evidence of the ongoing interrelationship of guards and cleaners in the workplace, where guards continue to work pursuant to an essential services agreement with Old Oak. In reaching that agreement, it is noteworthy that the employer never raised monitorial duties in respect of cleaners as part of the essential work of its guards. In working under that agreement, there has been no significant change in the relationship between the two working groups. Given this experience, I see no reason to predict any different result in the event that cleaners were to strike while guards were not on strike. In fact, the Labourers' other experiences with guards and cleaners at other workplaces supports that conclusion; a strike by one bargaining unit has not affected the ongoing performance of duties by fellow members in the other unit.

* * *

139. Taking these factors into account, I have concluded that no conflict of interest would result from the Labourers continuing to represent the guards at Old Oak.

File Nos. 3199-95-U and 3047-95-FC:**Bad Faith Bargaining and First Contract Arbitration****(i) The Evidence**

140. The Labourers served notice to bargain to Old Oak by letter dated May 25, 1995.

141. At an introductory meeting on June 12, the parties discussed the format of collective bargaining that they would follow. Jim MacKinnon attended for the union, and Ewald Bierbaum and Aly Lalani attended for Old Oak. MacKinnon explained that he would soon meet with the bargaining unit employees in order to choose a negotiating committee to support him in bargaining.

142. The key negotiators were MacKinnon and Ewald Bierbaum. Ewald Bierbaum always attended with Aly Lalani, but it was Bierbaum who spoke on behalf of and made decisions on behalf of Old Oak. MacKinnon was supported by a committee of guard employees and the business representative, Irene Nowicki, who services the non-construction members of the union, but it was MacKinnon who controlled and presented the union's position.

143. Clearly, MacKinnon came to the bargaining table with far greater knowledge of and experience in collective bargaining, having negotiated hundreds of collective agreements over many years. Ewald Bierbaum, on the other hand, had never negotiated a collective agreement. Nonetheless, it is difficult to picture him as a neophyte negotiator over his head in these circumstances, even without the benefit of his appearance as a witness in these proceedings. On the evidence offered through Aly Lalani and others, Ewald Bierbaum emerges as an impressive 'self-made' success. In building a substantial commercial enterprise out of little or nothing, he was inevitably involved in all sorts of commercial negotiations. And although none of these were negotiations with unions in respect of collective agreements (as Old Oak counsel was quick to highlight), it does not detract from Bierbaum's high level of competence and confidence as a negotiator. As is clear from the story of his bargaining with the Labourers, Ewald Bierbaum always had available to him the option of utilizing a lawyer experienced in collective bargaining. But as Lalani testified, Ewald Bierbaum wished to bargain this contract on his own, using legal support only in the background.

144. In summary, it was Ewald Bierbaum and MacKinnon who played the central roles in collective bargaining. They led their party's positions at the meetings which occurred on June 12, and July 17, 21, 24, and August 2, 16, 21, 25 and 31 (all in 1995).

145. The union commenced strike action on September 8 and the parties did not meet in an attempt to bargain a collective agreement until October 17. At that meeting, the employer was represented by a lawyer, Rod Dale, and by the guards' manager, Jim Reilly, neither of whom had been present at any of the prior meetings between the parties. MacKinnon continued to lead negotiations for the union at that October 17 meeting.

146. At the hearing of this case, MacKinnon gave extensive and detailed evidence of the negotiations and presented detailed contemporaneous notes that he kept during the meetings. He had independent recollection of most key events at the meetings, but occasionally used his notes to refresh his memory.

147. Ewald Bierbaum did not testify.

148. Aly Lalani testified and presented his notes which generally were vague. More significantly, Lalani was not certain of the time at which he made the notes, i.e., some might have been made in

preparation for meetings, some might have been made during meetings and some afterwards. He was also uncertain which parts of his notes reflected a record of statements uttered at meetings as opposed to notes to himself about outstanding issues. Furthermore, Lalani testified generally that he wrote notes either at the meetings themselves or at some point in the day or two days after each meeting. He was unable to be more specific about the particular sets of notes. As a result, I found MacKinnon's recollection of events to be more accurate and, generally, more reliable.

149. At the parties' meeting on June 12, MacKinnon explained the method by which he proposed that the parties should proceed. As he noted, it was the method that he uses whenever bargaining a first collective agreement. The union would start the process by tabling a proposed full collective agreement. After each bargaining meeting, MacKinnon would update the collective agreement on his office word processor to reflect the state of discussions. He would continually update the agreement to show what items were agreed and what items were outstanding. He would date each version of the document so that everyone could "follow where we're at". Each updated version would be provided to the employer prior to the next meeting so that the employer would have an opportunity to review the document for accuracy. Finally, MacKinnon indicated that the union, as per its usual course, wished to deal with monetary issues only after resolution of language issues.

150. The employer representatives neither objected to nor questioned MacKinnon's proposed process, and the negotiations carried on in that manner.

151. Lalani explained at the hearing that it was his understanding that nothing - no single item - was "set in stone" until the collective agreement was agreed to in full and signed by the parties and ratified by the employees. However, that view was never expressed to union representatives during the actual bargaining. Old Oak never suggested that it was of the view that it eventually expressed after the breakdown in negotiations, i.e., that items were merely tentative agreements with a reserved right to veto. What Ewald Bierbaum did say, at either the first or second bargaining meeting, was that he wanted to clarify that the collective agreement would not be *effective* until all items had been agreed to, as opposed to becoming effective item by item as agreed to during the bargaining process. MacKinnon confirmed that that was the case.

152. After that first introductory meeting, the parties received notice that the Minister of Labour had appointed a Conciliation Officer. The parties continued to meet and bargain pending the arrangement of a meeting with the Conciliation Officer.

153. On June 29, Lalani complied with the union request for provision of an employee list including current wage rates.

154. On July 12, MacKinnon sent the full collective agreement that the union was "proposing to work from" at the parties' next meeting. It included the following proposal in respect of contracting out of bargaining unit work:

2.05 The Employer agrees that all work covered by the Collective Agreement shall only be performed by bargaining unit employees under the terms and conditions of this Agreement.

The Employer agrees not to subcontract or contract out any or all of the work covered by this collective agreement.

155. The first real bargaining of terms and conditions occurred at the next meeting, on July 17. The parties undertook an article-by-article review of the union proposal. In discussing proposed Article 2.05, Ewald Bierbaum stated that the employer wanted to have the "option to contract out". MacKinnon asked "when", and Bierbaum replied simply, "at some point". MacKinnon told Bierbaum that the

Labourers had dealt with such concerns in other circumstances, and described in general the arrangement that the Labourers had negotiated with City Centre in respect of the Labourers' guards bargaining unit with that employer (see paragraph 67 above). MacKinnon explained that City Centre had been able to contract out the security services and that the contractor, Stinson, inherited the Labourers' collective agreement with City Centre. MacKinnon indicated that the union would be prepared to look at such an arrangement.

156. Although already set out above in the decision regarding guards' conflict of interest, it may be helpful to show again the relevant contracting-out language of the Labourers' agreement with City Centre. It reads as follows:

2.05

• • •

Should the Employer contract out any or all of the work performed by bargaining unit employees, the Employer agrees as follows:

- (a) Such new Employer (contractor), contracting or performing such work, shall be required to enter into and be bound to the terms and conditions of this agreement as if an original party thereto.
- (b) Employees performing such work shall be hired by the Contractor and be covered by all the terms and conditions of this Agreement. All seniority and conditions of employment applicable to such employees, shall also be assumed by the Contractor.
- (c) Articles 18 and 19 [Job Posting and Seniority] shall be applied by the Employer and the Contractor as if their employees were still employed by the Employer. This shall only be applicable to the employees in the attached Appendix "B".

157. According to MacKinnon, Bierbaum never indicated on July 17 or at any other time that the employer actually intended to or wished to contract out security services. MacKinnon merely understood that Ewald Bierbaum wanted language that would permit the "option to contract out...at some point". From MacKinnon's perspective, this meant that the parties should be turning their minds to an arrangement like the one the Labourers had with City Centre. In his view, nothing Ewald Bierbaum said led him or ought to have led him to conclude that Old Oak had an active business plan to contract out bargaining unit work.

158. As MacKinnon put it, an indication of an actual plan to contract out would not have been passed by lightly. It would have changed the complexion of negotiations entirely and become the primary focus of bargaining for the union. The union would not have spent time and energy discussing terms and conditions of employment with Old Oak if it knew that Old Oak did not intend to continue to employ its people. The union instead would have focused its energies on ensuring that the contract provided for successor rights and job protection in the event of contracting out.

159. MacKinnon made a note that the union would look at contracting-out language such as that negotiated with City Centre, and the parties moved on. In the result, the union and employer conducted their first full joint review of the union's proposed agreement during their meeting on July 17, 1996. On a few items they reached agreement, sometimes by way of simple variation on the original union proposal.

160. On July 19, 1996, MacKinnon sent an updated collective agreement to Old Oak, noting that the parties would work "from this amended Agreement at [their] next meeting on July 21, 1996".

MacKinnon's cover letter stated that the amended document was "based on our positions on July 17, 1995" and that:

Specifically, the following Articles have been amended:

Article 3.01(a)
Article 10.01
Article 17.01
Article 19.01
Article 26.04

161. When the parties met on July 21, they again worked through the entire agreement. They made some further progress and reached agreement on a number of items, although there was no progress on the issue of contracting out or proposed Article 2.05. As MacKinnon and Lalani each recalled, Ewald Bierbaum indicated that he wanted to meet eventually with his lawyer to review the items in respect of which the employer was indicating agreement. In MacKinnon's recollection, Ewald Bierbaum made it clear that the purpose of legal advice would be to confirm that the language reflected the intent of the parties' agreements on such items. MacKinnon recalled that Bierbaum reiterated on a number of occasions (at this and other meetings) that the intent would *not* change; Bierbaum only wished to ascertain that the agreed language said what it was meant to say.

162. Lalani testified repeatedly about what he understood to be the conditional nature of the employer's agreements on particular items; all items were subject, he believed, to review by Old Oak's lawyer. To Lalani, this meant that no item was "set in stone". (And as is discussed below, this was an important part of the employer theory of the case, given that Rod Dale suddenly took the position on October 17 that the employer had never agreed to any particular item and that the parties should start bargaining anew.) When pressed in cross-examination, Lalani admitted that he could not recall Ewald Bierbaum's words and that it was indeed possible that Bierbaum had said to MacKinnon that "the intent would not change" and that the lawyer's role was only to ensure that the laymen's language captured the discussed intent. When further pressed, Lalani also admitted that "it would be difficult to change" the employer's position on items that had been marked as agreed.

163. In the circumstances - including Old Oak's decision not to call evidence through Ewald Bierbaum to rebut MacKinnon's version of events, and Lalani's vague recollection and imprecise notes - I accept MacKinnon's testimony that Ewald Bierbaum promised that the intent of the parties' agreements would not change despite the employer's request to make language finalization subject to the lawyer's review. This fits with MacKinnon's decision to permit Bierbaum's request. MacKinnon testified that bargaining had been proceeding well and that the parties had been making some progress; in those circumstances he had no problem with the employer request. It seems likely that MacKinnon would have voiced some objection and made some more serious notation in his notes about an employer position that agreed items were not really agreed until the employer lawyer had reviewed them. That version also does not seem to fit with what I can gather to be the character of Ewald Bierbaum; on all of the evidence he appeared to be a forceful and decisive and capable negotiator - it seems unlikely that he would state that his decision-making authority was subject to a lawyer's advice.

164. At the July 21 meeting it was clear that there was agreement on a substantial number of items, even if many were of minor significance. MacKinnon advised that he would continue to provide updated versions of the working document. He advised that he would now use bold (or "highlighted") typeface to show items that remained in dispute, and 'unbolded' typeface to show areas of agreement.

165. Upon return to his office after the meeting, MacKinnon prepared the updated agreement and sent it to Old Oak on the same day, July 21, with a cover letter stating that the document "reflected the negotiations this date" and that the "highlighted areas are still outstanding".

166. The parties' next meeting was with a Conciliation Officer from the Ministry of Labour on July 24. Ewald Bierbaum stated that he wanted to consult with his lawyer with respect to the outstanding items and again stated that he would review the language of agreed items with him as well. MacKinnon's notes of the exchange state: "employer to talk to lawyer on outstanding issues; agree to items, intent will not change". At this meeting the employer raised the issue of wage rates. As Lalani explained in his testimony, the issue was very important to the employer since it would determine the cost of security services. The Conciliation Officer engaged the parties in some discussion of current hourly rates and classifications and sought to determine the average wage rate; MacKinnon's notes show that the \$8.00 was the average wage discussed. The parties did not move beyond that general discussion into any exchange of wage offers.

167. The next scheduled meeting between the parties was August 2. MacKinnon and his bargaining committee had miscommunicated and MacKinnon appeared alone on behalf of the union. As a result, little happened and the meeting was brief. However, a few minor items were discussed, and the employer noted that it now agreed to a particular Article. MacKinnon also raised a concern that the employer had altered working conditions in that Ewald Bierbaum was now doing a minor duty usually performed by the guards (collection of coins from a laundromat). Because bargaining had been going well, MacKinnon said, he did not want to press the point, and the parties reached agreement that Bierbaum could do the work on Sundays. Lalani recalls that the employer also asked that the union table its wage demand. MacKinnon's general answer to this question, whenever raised by the employer, was that compensation items ought to be dealt with only after the parties had finished working through the language issues.

168. After the meeting and on the same date, August 2, MacKinnon prepared and sent to the employer an updated version of the agreement. He noted that the new version now showed as agreed the minor items that they had discussed on that date. The cover letter also noted that he had amended the document to show Article 26.00 (concerning a proposed joint health and safety committee) as outstanding. MacKinnon recalled that Ewald Bierbaum was adamant in his opposition to the concept of such a committee, fearing that it would be used for purposes other than health and safety matters.

169. The next negotiating session was on August 16. At the start, Ewald Bierbaum advised that he had met with his lawyer. Bierbaum had received counsel on items that had not yet been the subject of any agreement. Bierbaum then put forward the employer's position on these items; in many instances, the union was able to instantly agree to the employer's proposal and MacKinnon made notes accordingly. Bierbaum had also reviewed with his lawyer the items in respect of which the parties had already reached agreement. Despite the earlier promise that the "intent would not change", Bierbaum proposed minor changes to even these items. For example, Article 4.04 described limits on the grievance rights of employees "with less than 30 days service". Bierbaum now sought a change to "60 days". MacKinnon immediately agreed. Under cross-examination, MacKinnon was asked why he would permit substantive changes to Articles that he believed were agreed and that would not change in their intent. MacKinnon explained that the requests were minor, were ones that the union could live with, and were worth permitting in order to keep up the pace of progress in bargaining.

170. At the August 16 meeting the employer reiterated its position that it wanted the option to contract out security services. There was no suggestion of an actual plan under consideration. MacKinnon again told Bierbaum that the Labourers had made arrangements with another employer that allowed for contracting out and that the union was prepared to consider such arrangements with Old Oak.

171. After the conclusion of the meeting, MacKinnon prepared an updated agreement at his office. The cover letter dated August 16 was somewhat more detailed than in earlier instances. Again, the letter noted that outstanding (or unagreed) items were "highlighted", i.e., in bold typeface. But on

this occasion MacKinnon listed all of the Articles (24 in total) that he had “amended...either as outstanding or agreed to based on the parties’ positions this date”. Further unlike his earlier letters, he asked for a written response prior to the next meeting in the event that the employer questioned the accuracy of his updated document. As MacKinnon testified: “this was the effort after they had met with their lawyer, so I wanted to be clear about our understandings.” There was no response until oral discussions at the next meeting.

172. When the parties met next, on August 21, the employer sought further changes to items that MacKinnon had marked as ‘agreed items’. Again, MacKinnon agreed to changes. In his view, the requests were again so minor that he did not want to hold up the progress of continued bargaining on outstanding items. For example, Article 6.02 dealt with shop stewards conducting union business during working hours with the consent of the employer. The Article as agreed stated that “Any such meeting must be held at the place of work”. Ewald Bierbaum very much wanted the word “meeting” to be replaced with the word “duties”. Although the change did not make much sense to MacKinnon, it was unimportant to the union. He agreed to the change in an effort to satisfy Bierbaum and to move on.

173. It was at the August 21 meeting that the parties finally gave substance to the critical discussion of contracting-out language. MacKinnon came to the meeting with a detailed written proposal that would allow a form of contracting-out. As he testified clearly in both examination-in-chief and under cross-examination, he came to the meeting with the plan that no language would be presented until he was certain that Ewald Bierbaum accepted the basic principle of the union proposal. As MacKinnon stated, he “specifically asked” if Bierbaum agreed that in the event of contracting out the contractor would be required to hire Old Oak guard employees, and that the contractor would be bound to the Labourers’ collective agreement with Old Oak. According to MacKinnon, Bierbaum said that he did not have a problem with that principle. Only after hearing that assent was MacKinnon prepared to present his language proposal. He then did so, explaining that the union would be prepared to “work from language like this”. It read as follows:

2.05 The Employer agrees that all work covered by the Collective Agreement shall be performed by bargaining unit employees under the terms and conditions of this Agreement.

Persons not covered by this Agreement, shall not perform work that is covered by this Agreement.

The Employer agrees not to subcontract or contract out any or all of the bargaining unit work covered by this Collective Agreement, unless;

- (a) The Contractor, contracting or performing such work, shall enter into and be bound to the terms and conditions of this Agreement and any renewals thereof, as if an original party thereto, and both the Employer and the Contractor shall be parties to this Collective Agreement and any renewal thereof.
- (b) The employees in the bargaining unit at the time of the subcontracting or contracting shall be hired by the Contractor and be covered by all the terms and conditions of this Agreement which shall continue to apply to all such work and all such employees including, but not limited to the seniority and other conditions of employment.
- (c) Articles 18 and 19 shall be applied by the Employer and the Contractor as if their employees were still employed by one Employer.
- (d) If the Employer and the Contractor breach (a), (b) or (c) above, absent any other effective remedy for such breach, the Employer agrees to hire those persons who are, or were, performing bargaining unit work and shall in accordance with (c) above retain all rights and privileges afforded them by this Collective Agreement.

MacKinnon asked Bierbaum to review the language before the next bargaining session. There was still no suggestion of any actual employer plan to contract out bargaining unit work. The parties then moved on to another item.

174. Lalani remembered that the union presented its proposed contracting out language at the August 21 meeting. He also recalled that MacKinnon asked whether Old Oak accepted the principle that any subcontractor would be required to adopt the Labourers' collective agreement; he did not recall whether that question was posed before presentation of proposed language. In his view, Ewald Bierbaum never said that he had no problem with that concept; he believed that Bierbaum had only agreed that employees would not lose their jobs. However, Lalani was uncertain of whether Bierbaum might have agreed that the employees would be hired under "the same terms and conditions", or "under the same agreement".

175. As already noted, Ewald Bierbaum never testified in these proceedings. As in other instances, Lalani's recollection and the notes made around the time of negotiations were vague and uncertain when contrasted with MacKinnon's clear and consistent testimony. In respect of this critical point in evidence, the problem with Old Oak's decision to forego calling Ewald Bierbaum as a witness is set in its greatest relief. Lalani's testimony amounted to his understanding of what Bierbaum had agreed or not agreed to. Given his inability to recall the words uttered long ago, and his lack of reliable notes to refresh memory, his mere understandings of Bierbaum's intent are not particularly helpful to me. As Lalani admitted, Bierbaum alone was the decision-maker for Old Oak. Especially on the essential issue of negotiations regarding contracting out, only Bierbaum's testimony might have fully contradicted MacKinnon's testimony. As a witness to words uttered and to sequences of events, MacKinnon proved a more reliable witness - hardly surprising given that collective bargaining is his main business, in contrast with Lalani who was new to the process and who was not responsible for decision making.

176. In the result, I accept MacKinnon's recollection of events. In particular, I find that Ewald Bierbaum advised the union on August 21 that Old Oak accepted the principle that contracting out would be permissible in the event that the contractor assumed the Labourers-Old Oak collective agreement and hired the Old Oak guards.

177. Under cover of a letter dated August 22, MacKinnon provided a further update of the 'working version' of the collective agreement. His letter summarized which Articles had been updated to "reflect the items amended, deleted or agreed to" at the August 21 meeting. As usual, he dated the new version with the date of the parties' next meeting. In this case, the next bargaining session was slated for August 25.

* * *

178. Unbeknownst to the Labourers, Old Oak was at this time in the midst of discussions with Burns regarding the contracting out of Old Oak's security services. And by contract dated August 23, Old Oak entered into a contract with Burns. As Lalani admitted, he was aware that Old Oak had decided to contract out the Labourers' bargaining unit work prior to the negotiating session of August 25. And as Ray Hibberd, Burns' General Manager for Southwestern Ontario explained, Burns had been actively seeking a contract with Old Oak for some time (certainly as early as July).

179. At an early meeting with Ewald Bierbaum, Aly Lalani and Greg Bierbaum, Hibberd advised Old Oak that Burns would need to know the number of Old Oak guards, their hours worked per week, their rates of pay in order to allow Burns to prepare an offer that would comply with the requirements of the Bill 40 provisions in the *Employment Standards Act*. (Since repealed by Bill 7, those provisions required a contractor taking over security services from another contractor or building owner/manager

to, *inter alia*, make reasonable offers employment to the former employer's employees.) Hibberd also provided the Old Oak representatives with copies of Bill 40, the Burns-UPGWA collective agreement, and a copy of the collective agreement between Pinkertons (its competitor) and the Steelworkers. Old Oak advised Hibberd of the Labourers' certificate and that no first agreement had been reached. As Hibberd testified, "it was [his] impression that they thought the Labourers would be our problem".

180. The Burns-UPGWA contains some significant differences from the proposed agreement that Old Oak and the Labourers were developing in the course of their bargaining. It contains no provision for job protection or protection of bargaining rights in the event of contracting out. Most significantly, the UPGWA agreement contains an appendix that lists many reasons that constitute just cause for exercise of the management right to discipline or dismiss guards. It includes provision that Burns has cause for dismissal of an employee if a customer complains about the guard or wants the guard removed from its site. Although they had received a copy of the UPGWA collective agreement, Greg Bierbaum and Aly Lalani said that they never knew of such a provision and that, in any event, Old Oak would not contemplate exercising such an option as a customer of Burns since Old Oak's intention was to ensure that its guards continued in employment. Burn's representative, Ray Hibberd, testified that this provision of the agreement was not enforced; he knew of only one incident where a customer was displeased with a guard and which was resolved with the transfer of the guard to a different location.

* * *

181. Old Oak never mentioned these dealings to the Labourers. Old Oak did not advise the Labourers that it was making plans to subcontract the work, nor did they later advise that they had signed a contract with Burns. As I have already found, Old Oak never did more than indicate that it wanted the "option" to contract out at some indefinite point in the future.

182. Indeed, at the parties' next meeting on August 22, Old Oak carried on bargaining with respect to the terms and conditions of contracting out - despite the fact that it had already done so on its own terms, without notice to the Labourers.

183. On August 25, the parties returned to the Labourers' proposal on contracting out. MacKinnon recalled that Ewald Bierbaum's concerns were focused on those parts of the language that addressed the continuing renewal of the agreement, and MacKinnon made a note of that, as well as circling the problematic wording on his copy of the language proposal. Bierbaum explained that the notion was unusual to him, since in all of his other dealings he was accustomed to negotiating a definite end to the contract. He was concerned with the labour relations concept of 'automatic renewal' of contracts. MacKinnon circled the "renewal" language on his working document, showed it to Bierbaum, and asked if Bierbaum would agree to the proposal if that wording came out. Bierbaum deferred his answer, and the parties moved on to discussion of other items. MacKinnon recalled, and his contemporaneous notes confirmed, that the parties agreed that the first sentence of the union's original Article 2.05 was now agreed (while the main content of the contracting out language remained outstanding). [The first sentence read: "The Employer agrees that all work covered by the Collective Agreement shall only be performed by bargaining unit employees under the terms and conditions of this agreement."]

184. Again, Lalani's recollection was more vague; and his notes were dated August 28, though he believed that was an error and that, in any event, his notes reflected his understanding of what occurred on August 25. He thought that he and/or Bierbaum had indicated that they were not comfortable with the union proposal and that they would review it to see if they could live with any of it. He also did not believe that Old Oak had indicated that agreed to the first sentence of Article 2.05 (the contracting out provision). Again, I accept MacKinnon's recollection as the more accurate record of things said on that date. It is also the more likely version of events, given what I find to have occurred at the previous session. Since Old Oak had indicated on August 21 that it accepted the basic principle

(of flow-through of bargaining rights, and of job security for the guards), and since MacKinnon had left the language proposal for Old Oak to review with a mind to future discussion, it is not likely that MacKinnon would have failed note on August 25 (as he did on August 21) that the employer would review the language to “see if [they] could live with *any* of it”. As reviewed below, I also accept MacKinnon’s version of the agreement on the first sentence of Article 2.05.

185. In MacKinnon’s view, nothing happened on August 25 to upset the agreement in principle that had been reached on August 21 with respect to contracting out. For that reason, he was content to move on to discussion of other issues after his and Bierbaum’s exchange regarding “renewal” language in the contracting out proposal.

186. After the meeting, MacKinnon did his usual update of the working version of the agreement. His cover letter dated August 25 indicates that the new version reflected agreements with respect to several items, including the first sentence of Article 2.05. That was never challenged by the employer until these proceedings. MacKinnon’s letter also advised that the union was now prepared to accept an employer proposal regarding hours of work, and the working document was amended accordingly. The new version was dated August 31, the date of the parties’ next scheduled bargaining session.

187. MacKinnon later noticed that he had made two errors (as pointed out by one of the guard employees at the union negotiating committee’s meeting with the bargaining unit following the August 25 meeting). By letter dated August 25 he pointed them out to Old Oak.

188. There was no further contact between Old Oak and the union prior to the August 31 meeting.

189. On August 30, the guards received both a memorandum to all employees from Old Oak and a letter to the guards from Burns. The Old Oak “Notice to All Security Employees” dated August 28 advised that

effective September 18, Burns will be operating all security services at Old Oak sites.

It said nothing of what would become of Old Oak guards’ employment or of their bargaining agent, the Labourers. The Burns letter, the intent of which was disputed at the hearing of this matter, stated as follows:

It gives me great pleasure to inform you that Burns International Security Services Limited has been awarded the security services contract at Old Oak Properties Inc. effective at 0800 hours, Monday, September 18, 1995. We have been informed by our new client that you are presently assigned as a Security Officer at Old Oak Properties.

Amendments to the Ontario Employment Standards Act (Bill 40) requires that if a successor employer replaces a previous employer who is providing services at the premises, the successor employer shall make reasonable offers of available positions to those persons;

- a) who are in a continuing or a recurring and cyclical employment relationship with the previous employer immediately before the successor employer begins providing the services at the premises; and
- b) whose principal place of work with the previous employer is the premises affected by the change in the employer providing the services.

The successor employer shall make offers to the persons employed by the previous employer in descending order of each person’s seniority with the previous employer until all positions are filled.

The position offered must consist of performing, at the same premises, the same work that the person did for the previous employer, if such a position is available.

May I ask that you follow the following steps in order to ensure a smooth transfer of security services:

- i) Kindly contact the writer no later than Thursday, August 31, 1995, 1700 hours to advise whether or not you intend to join Burns International Security Services Limited.
- ii) If you are interested in joining Burns International Security Services Limited, you will be required, as a condition of employment, to complete the following process:
 - . complete an Employment Application Form at our office.
 - . be interviewed and informed of the hourly wage rate, eligibility for the employee benefits plan, and schedule of work;
 - . complete the Security Officer Induction Training Programme
 - . initiate the process and obtain from the Ontario Provincial Police a Security Guard Licence
 - . complete an employee file (Policies and Procedures)
 - . receive the required uniform

Should I not hear from you on or before Thursday, *August 31*, 1995, 1700 hours, we will assume that you have declined the opportunity to join Burns International Security Services Limited.

190. Those Old Oak guards who responded to the Burns "offer" received a package that Burns' General Manager for Southwestern Ontario, Ray Hibberd, described as typical of the sort given to applicants for employment as Burns guards. It includes information on training and orientation, a copy of the Burns-UPGWA collective agreement, and an application for membership in the UPGWA. As Hibberd explained, in order to be successful an applicant must be licenceable by the Ontario Provincial Police and must successfully complete the Burns orientation program. The package received by applicants also says that successful completion of the orientation program is no guarantee of employment. (Eventually, six guards responded individually to the Burns "offer" and attended the orientation program; 3 accepted employment.) The package also makes it clear that employees must serve a probationary period consistent with the UPGWA-Burns collective agreement. There was never any suggestion that Burns would waive the probationary period in employment of former Old Oak guards.

191. Greg Bierbaum testified that it was his understanding that the decision to contract out to Burns would have no adverse effect on the guards employed by Old Oak. He understood from his discussions with Burns that Old Oak employees would be hired under the same terms and conditions of employment that were in place under Old Oak. Aly Lalani understood the same. Both Lalani and Greg Bierbaum said that, for Old Oak, this was a key requirement of the deal with Burns. In cross-examination, Lalani admitted that there is nothing in Old Oak's contract with Burns that addresses the rate of pay that guards will receive or their other terms of employment. The contract refers only to the billing rate that Burns will charge to Old Oak.

192. Neither Old Oak nor Burns sent anything to the Labourers nor did they contact them in any way. Lalani testified that this was an oversight. Eventually, Old Oak sent an official notice of the contracting out to the Labourers, but not before the MacKinnon and the Labourers had already learned of what had happened through their members employed as guards.

193. After hearing from the guards, MacKinnon gave formal reaction on behalf of the union and its members at Old Oak. In a union letter to both Burns and Old Oak, MacKinnon staked out the Labourers' position that the surprise move to contract out bargaining unit work constituted violation of

the *Labour Relations Act* and that Old Oak could not pass off employment of the guards. The letter carried on to set out the union's alternative position that it accepted on behalf of the guards employment with Burns.

194. Despite these occurrences, Old Oak and the Labourers carried through with their meeting as scheduled for August 31. Not surprisingly, the only topic of discussion was Old Oak's subcontract of security services to Burns. However, Ewald Bierbaum and Aly Lalani had very little to say. Bierbaum said that the Old Oak and Burns letters to employees were self-explanatory of the situation. When MacKinnon asked where this left the parties in collective bargaining, Bierbaum answered that Old Oak had to "remove [itself] from negotiations" since they could not negotiate for "someone else's employees". Lalani confirmed this story in his testimony, as well as the fact that Bierbaum advised that it was his view that the Labourers should now be negotiating with Burns. MacKinnon was very upset. No other issues were discussed. MacKinnon advised Bierbaum and Lalani that the Labourers would be proceeding with charges of bad faith bargaining.

195. The Labourers never met with Burns. On September 8 (ten days prior to the scheduled take-over of security services by Burns), the union commenced a lawful strike. Greg Bierbaum, the Vice-President of Properties Administration, testified about his statements published in the *London Free Press* soon after the Labourers' strike started. Although he explained that the comments were made in the heat of tension, he did confirm that he said that he saw the strike as a union boss' (MacKinnon's) battle to keep members and their dues. It was Greg Bierbaum's view that the guards "would be better served by a security union than the Labourers". He also said that "Bill 40 is history come Monday when the Legislature meets".

196. After commencement of the strike, Old Oak notified the Labourers that they wished to employ "specified replacement workers" in accordance with section 73.2 of the version of the Act then in force. The union requested further particulars of the employer's needs. Meanwhile, Old Oak started to use Burns to provide what it described as the 'essential services' left unprovided with the commencement of the strike. The Labourers filed a complaint before the Board alleging violation of section 73.1 (the prohibition against certain replacement workers then contained in the Act). That matter, in Board File no 2223-95-U, was settled by the parties on September 13 and the settlement was incorporated into an order of the Board. Old Oak agreed that it would only use Old Oak bargaining unit employees to perform guards' work. The parties reached agreement on the level of services to be performed during the currency of the guards' strike.

197. On or about September 18, Burns began to employ its guards to perform security services at Old Oak sites. The Labourers filed further applications before the Board alleging violation of the earlier settlement and further violations of the Act. Once again the parties were able to settle the matters prior to hearing and the Board incorporated their settlement into an order, in Board File Nos. 2328-95-U and 2329-95-U. Once again, Old Oak promised not to use Burns and use only Old Oak bargaining unit employees to perform guards' work. The parties renewed their agreement on the essential services that guards would perform during the currency of their strike. That level of service has been maintained since then.

198. In those matters before the Board in September of 1995, Old Oak was represented by Rod Dale, a partner at a London law firm. (Old Oak changed counsel prior to the hearing of these matters.) Although Ewald Bierbaum did not attend at the Board hearings regarding replacement workers, it was clear that Dale was receiving instructions on Old Oak's position from Bierbaum through telephone contact. At some point, Dale indicated that the parties should attempt a return to collective bargaining. MacKinnon agreed to the suggestion. With the assistance of the Ministry of Labour Conciliation

Officer, the parties met again on October 17. It was their first effort at collective bargaining since the events of late August.

199. For the first time in the parties' experience, Old Oak was not represented by Ewald Bierbaum and Aly Lalani. Instead, Rod Dale and Jim Reilly attended for the employer. Dale testified that he wanted to have an employer representative who had "hands-on, nuts and bolts" experience with the work of the bargaining unit. According to Dale, he felt that it was important to have someone to advise him with respect to particular clauses. Although Dale acknowledged that MacKinnon's updated August 31 version of the collective agreement reflected the last state of negotiations, Dale thought that the purpose of the October 17 meeting ought to be a clause-by-clause review of the agreement with feedback from Reilly and from the Old Oak employee members of the union negotiating committee. In that regard, Dale appeared (both at the meeting and in his testimony before me) to be displeased with the fact that MacKinnon was sole spokesperson for the union and that Dale was unable to draw comments from guard members of the union committee.

200. Although Dale took the position that the parties should revisit each and every clause, he did not come to the meeting with written proposals because "it was a mediation". Dale says that he readily conceded that neither he nor Reilly had authority to bind Old Oak to any position; Ewald Bierbaum remained the ultimate decision-maker. But in Dale's view, MacKinnon was in the same position since he had to ratify an agreement. Nonetheless, Dale went through each clause and set out an employer position.

201. As MacKinnon recalled and Dale did not rebut, Dale jotted down his proposals as he made them.

202. In many cases of clauses that were marked as agreed to in the August 31 version of the agreement, Dale changed the employer position. Although Dale denied MacKinnon's allegation at the hearing of this matter that Dale was merely "winging it" (or making up an employer position as he went along), Dale admitted that he could "see how MacKinnon could be left with that impression, if he thought I would be attending the meeting with a formal proposal; I could see how he could come to that honest belief, albeit a mistaken one".

203. Both parties were unsatisfied with the October 17 meeting. Dale felt that MacKinnon was uninterested in negotiating. On return to his office, Dale dictated a formal version of the proposals that he made during the October 17 meeting and sent them to MacKinnon in a letter dated October 19. In a number of instances, the written proposals differed from the oral position set out by Dale at the meeting. As Dale explained: "since [MacKinnon] didn't give me any feedback I felt it didn't matter, I had perfect licence to make any amendments or improvements". Dale sent the October 19 letter without having its contents reviewed by his client, Old Oak.

204. MacKinnon was convinced that Old Oak had sent representatives who had no bargaining authority. At a number of points in the October 17 meeting, he pressed this point with Dale. In particular, he suggested that it was clear that Dale had never discussed the state of prior bargaining with Ewald Bierbaum and that Dale had no idea of the agreements of certain items that the employer had already reached with the union. For example, MacKinnon thought it more than a little odd that Dale was seeking changes to specific language that Ewald Bierbaum himself had demanded (e.g., the language about union "meetings" versus "duties" done during working hours) and that Dale was willing to agree to things that Ewald Bierbaum had often and adamantly refused (e.g., a joint health and safety committee). Dale refused to be drawn into a discussion of the issue, claiming solicitor-client privilege prevented such discussion.

205. The issue of solicitor-client privilege was an important one at the hearing of this matter, since Old Oak refused to waive privilege in respect of questions put to Dale in his testimony. In upholding the Old Oak objection to union cross-examination of Dale, I noted that I thought it unusual for an employer to forego an opportunity to offer rationale for positions taken in bargaining when subject to allegations of bad faith bargaining. Typically, an employer seeks to explain the instructions that its principals have given to their negotiator. In this case, Old Oak chose not to offer any explanation for the positions taken by Rod Dale.

206. The problem caused to the employer case by the general lack of explanation was amplified by the bits of information that it did permit its lawyer to disclose. Dale advised that prior to October 17, he had received instructions from either Ali Lalani or Greg Bierbaum. The last time that he had met with Ewald Bierbaum was in August. It is simple, then, to deduce that Dale came to the October 17 meeting without having reviewed the employer position with Ewald Bierbaum, the employer decision-maker. When asked whether he had authority to make the proposals he did (without having consulted Ewald Bierbaum), he answered that "I was given instructions to...[he rephrased at this point]...my mandate was to negotiate a collective agreement subject to ratification by my clients". It is clear to me that his proposals had not been approved by his client. At some point in the tense interchange on this issue in the October 17 meeting, Dale sarcastically told MacKinnon that he "had a hunch" that the employer would accept his recommendations.

207. Dale testified that he realized that the parties had reached agreements on a number of Articles in the proposed agreement. But in his view, "nothing was signed off". The August 31 document showed tentative agreements, but Dale was there to negotiate and to bring his expertise to the employer. He saw the agreements on certain items as tentative ones that either party could change in the 'give and take' of bargaining.

208. Throughout the October 17 meeting, MacKinnon took notes as usual. On this occasion, however, he was more meticulous; at several points he stopped Dale in order to be sure that he had accurately recorded what Dale had said. For the most part, Dale did not challenge MacKinnon's notes and I accept them as accurate record of the matters that I have found relevant. MacKinnon asked whether Dale's proposals had been agreed to by the employer, and Dale said he would have to go back to the employer. Dale refused to answer whether he had even discussed the proposals he was making with the employer, claiming that such information was privileged.

209. On the key issue of contracting out, MacKinnon was especially careful in his notes. For the union it was now, of course, the crux of bargaining. MacKinnon asked whether Old Oak would agree to language that required a subcontractor to be bound by the Labourers-Old Oak collective agreement. Dale answered, "no, not unless the law required" such a result. When cross-examined, Dale confirmed that he had said as much. In explaining it, Dale stated that MacKinnon knew that Old Oak had had discussions with Burns and that Burns was bound to a collective agreement with a different union (UPGWA). As Dale said, "if the law did not require it, I'm not going to enter an agreement binding the next union". (Both MacKinnon and Dale were aware of the Board's decision in *Ensign Security Services Inc.*, [1994] OLRB Rep. Oct. 1310, and both understood that the decision implied that the bargaining rights of Old Oak guards were likely to transfer to the UPGWA in the event that the guards became Burns' employees.)

210. Dale told MacKinnon that he would negotiate contracting out protection for the Labourers "only if the law required it". MacKinnon was also struck by the new position that Dale presented on behalf of the employer: Dale now proposed that the agreement should contain specific language that expressly allowed the employer the right to contract out, even though Ewald Bierbaum had never suggested such a provision. MacKinnon says that he saw that there was no point in further bargaining.

When this perspective was put to Dale in cross-examination, his response was reflective of the employer's general position in response to the union's allegation of bad faith bargaining. In his view, there was no adverse impact on the employees in the event that Burns took over their employment. They would work for Burns, still protected by a collective agreement, merely paying their dues to a different union. If the Bill 40 sale of business provisions with respect to contracted-out security services survived a change in law, then there might be a question of whether the Labourers' bargaining rights survived the transfer; the question would be which of the two unions was paramount. As Dale summarized, "employees would not be affected in an adverse way".

211. After receiving Dale's letter of October 19, the union filed its complaint of bad faith bargaining. No bargaining occurred thereafter.

(ii) Decision

212. In pleading its defence to the Labourers' allegations of bad faith bargaining, Old Oak staked its response on the argument that it could not be found to be motivated by anti-union animus in light of the fact that its chosen subcontractor, Burns, was a unionized contractor. The Response filed by the employer put it this way:

Old Oak denies that it has conducted itself to avoid its obligations under the Act, to avoid dealing with a union, or to penalize its employees for seeking to unionize. The U.P.G.W.A. is the bargaining agent for employees of Burns.

213. Old Oak's conduct after announcing to the Labourers its contract with Burns does not support such a conclusion. Its desire to remove itself from collective bargaining obligations was immediately apparent. At the parties' meeting on August 31, Ewald Bierbaum and Aly Lalani took the position that they no longer had any obligation to bargain. In no uncertain terms, Old Oak advised the Labourers that the problem of collective bargaining was now Burns' business. Indeed, this was the same impression that Burns' representative (Hibberd) had of Old Oak's position during the Burns-Old Oak contractual negotiations. By August 31, Old Oak no longer had anything to say to the Labourers about contracting out or about any other collective bargaining matter. In short, the employer refused to bargain after advising the union of the deal with Burns. This violated the employer's statutory duty to bargain. Moreover, the employer's conduct before and after that event constituted further violation of the duty to bargain in good faith pursuant to section 17 of the Act.

214. Old Oak was obliged to advise the Labourers of its plan and its eventual implementation of contracting out of bargaining unit work. Yet Ewald Bierbaum raised the issue as merely one of general "option" and, despite MacKinnon's request for specifics, concealed the fact of an actual plan under consideration. (As Burns' representative Hibberd noted, Burns had been speaking with Old Oak since at least July.) Instead, Old Oak continued to bargain without advising the union of its plans - and its eventual action - in respect of the most critical issue on the table. While Old Oak disputes that it had reached agreement on the principles of contracting out (i.e., that any subcontractor would inherit the Labourers-Old Oak agreement and hire Old Oak guards), it cannot dispute that it failed to disclose its plans and its actions in respect of contracting with Burns. The evidence discloses unequivocally that Old Oak pretended that the issue was a live one despite the deal already made with Burns. Despite having already contracted out to Burns on his own terms, Ewald Bierbaum went through the motions of supposed consideration of the Labourers' contracting out proposal on August 25. As Aly Lalani put it, the employer position on August 25 was that it wanted to look at the MacKinnon contracting out proposal "to see if we could live with it". Instead, the employer's quiet dealings with Burns proved that the employer had no intention to consider such an option.

215. In the parlance of the Board's case law, Old Oak engaged in "sham" bargaining on the critical issue of contracting out. While the employer was free to engage in "hard bargaining" and was free of any obligation to actually reach an agreement, it was obliged to make every appropriate attempt. (See *Plaza Fiberglass Manufacturing Limited*, [1990] OLRB Rep. Feb. 192 at paragraph 19.) Its pretensions of continuing bargaining on the issue of contracting out were clearly inappropriate in face of the fact that it had already made a contract with Burns in full knowledge of the probability (or at least possibility) that the Labourers would lose bargaining rights to the UPGWA. Even if Old Oak's decision was wholly free of anti-union animus, it had an obligation to raise and discuss its decision to contract out. (See *Plastics CMP*, [1982] OLRB Rep. May 726, and especially paragraph 34).

216. The Board has also had occasion to discuss the obligation of an employer to disclose during negotiations initiatives that will significantly impact the bargaining unit. In *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577, the Board described the duty as follows:

39.....the section [17] duty requires an employer to respond honestly when asked in bargaining if he is contemplating initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit. Similarly, can there be any doubt that an employer is under a section [17] obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.

When MacKinnon asked Ewald Bierbaum for specifics of the employer proposal of the "option" to contract out, Old Oak and Ewald Bierbaum had a duty to respond honestly in order to permit the union an opportunity to alter its approach to bargaining. (See paragraph 31 of *Plaza Fiberglass*.) As MacKinnon testified and as I accept, knowledge of the employer's actual plan to contract with Burns would have dramatically altered the union's focus in negotiations.

217. I further find that the employer reneged on the agreement in principle that Ewald Bierbaum and MacKinnon had reached in respect of contracting out. At the same time that the employer reached agreement with the Labourers that contracting out would occur only in the event of continued Labourers' bargaining rights and employees' job protection, the employer was making a deal with Burns that it knew would jeopardize those matters. Had the union understood that the employer was considering an actual plan to contract out, bargaining would have immediately taken a different form; as MacKinnon testified, and as is reasonable to presume in the circumstances, the union's sole focus would have been contracting out.

218. On August 31, the employer took matters a step further. It refused to bargain further with the Labourers, taking the position that it was no longer Old Oak's responsibility. Its position was uncompromising. While it returned to the table some weeks later after various Board proceedings, it remained uncompromising on the critical issue of contracting out and refused to acknowledge its earlier agreement in principle to the Labourers' proposal.

219. I further conclude that upon later return to the bargaining table on October 17, the employer sent a representative who was not fully informed of the state of bargaining, who had no specific authority to reach agreements on any item, and who was not in communication with the employer decision-maker, Ewald Bierbaum. Moreover, the employer now sought to renege on all agreements that had been reached in prior bargaining. I find that MacKinnon's updated version of the collective agreement dated August 31, together with his two letters of August 25, reflected the parties' agreements as of the last bargaining session (on August 25).

220. The most significant change of position, of course, was that regarding the principles that should govern contracting out. Beyond abandoning its earlier agreement in principle, the employer refused to bargain *any* form of restriction on contracting out, and now sought specific contractual endorsement of the management right to contract out. As in other examples (such as the health and safety committee), the employer took a position that contradicted its earlier commitments in collective bargaining. The employer's positions on October 17 contradicted the agreements in place as of August 25, without explanation. In his testimony, Dale effectively rebutted the union's pleading that the employer had renegged because it took the view that "all deals were off" because the union had commenced a strike. Yet neither he nor any other representative of his client offered any meaningful explanation for the employer's new position as of October 17. Nor was any offered in his letter dated October 19, in which Dale altered the positions set forth on October 17 (and which Dale sent to the union without ever consulting the employer decision-maker).

221. If the employer was unwilling to commit to the principle that a subcontractor was bound to the Labourers' agreement and bound to hire Old Oak guards, then it was understandably difficult for the union to see any point in bargaining about any other items. If Old Oak was to contract out to a company that was not bound to the Old Oak agreement, what was the point in an agreement? Old Oak's answer was simple: continued negotiations made sense only if the law required a contractor to 'inherit' the building owner's agreement upon contracting out of in-house security services. The impending changes in law that form a backdrop to this case, and the impact that they would have on the Labourers' bargaining rights, were not lost on any of the participants. Bill 40's provisions in what was section 64.2 of the Act would have ensured flow-through of the Labourers' bargaining rights and any collective agreement to a subcontractor (subject to the competing rights of a trade union with incumbent bargaining rights with the subcontractor, e.g., as the Board found superseded the predecessor's rights in its decision in *Ensign Security Services Inc.*). But the government had promised repeal of all of Bill 40.

222. Taking into account all of these factors, I find that Old Oak sought to avoid its obligation to bargain with the Labourers. And when it returned to bargaining, it failed to send negotiators who were sufficiently knowledgeable of the process, including "its history and parameters"; this was "inimical to the process of rational, informed discussion which is crucial to bargaining in good faith", as the Board said of similar circumstances in *Crane Canada Inc.*, [1988] OLRB Rep. Jan. 13, at paragraph 28. Further, the failure of communication between Rod Dale and Ewald Bierbaum (the decision-maker) constituted a failure of the employer to make reasonable or expeditious efforts to conclude a collective agreement as contemplated by section 43(2)(b) of the Act. (See similar circumstances described in *Co-Fo Concrete Forming Construction Limited*, [1987] OLRB Rep. Oct. 1213, at paragraph 33.)

223. In other support of its claim that it acted without anti-union motive, the employer stressed its position that contracting out would have no adverse impact on its employees. Old Oak argued that Burns offered all of the guards employment on the same terms and conditions that were in place with Old Oak.

224. Greg Bierbaum told of his understanding that the decision to contract out to Burns would have no adverse effect on the guards employed by Old Oak. From his discussions with Burns, he claims that he understood that Old Oak employees would be hired under the same terms and conditions of employment that were in place under Old Oak. Aly Lalani understood the same. Both Lalani and Greg Bierbaum said that, for Old Oak, this was a key requirement of the deal with Burns.

225. In fact, Lalani's and Greg Bierbaum's claims were not reflected in Burns' dealings with the Old Oak employees. The Burns' "offer" to employees contained in its letter of August 28, 1995 indicates conditions that could result in screening out of some of the Old Oak guards from employment with Burns. For example, Burns, as a registered security firm, must ensure that all of its guards are

licenceable by the OPP. Further, as Aly Lalani admitted in cross-examination and as is clear from the face of the contract entered by Old Oak and Burns, there is nothing in the contract that addresses the rate of pay that guards will receive. In addition, employees would be faced with a period of probationary employment.

226. I also find that Old Oak understood the possibility, if not the probability, that the UPGWA would become bargaining agent for guards who accepted employment with Burns. Old Oak principals had discussed with Burns representatives the impact of Bill 40 provisions on the contracting out of security services. From the start of discussions with Burns, Old Oak principals had a copy of the Burns-UPGWA collective agreement. Burns provided a copy of the Pinkertons-Steelworkers agreement for contrast; in addition, Old Oak had their own ongoing collective bargaining experience with the the Labourers to contrast with the UPGWA deal with Burns. Without setting out the details of the UPGWA agreement, it suffices to note that it contains terms and conditions that were never contemplated in Labourers-Old Oak bargaining, especially in respect of management rights in discipline and dismissal and in respect of contracting out.

227. Perhaps the most obvious change in circumstances would be in respect of the guards' choice of bargaining agent. This possibility was clear to Old Oak at all times. Indeed, the evidence indicates that Old Oak viewed it as the likely result and a preferred result. Greg Bierbaum's comments to the press underscored the employer's consistent position that employees were not adversely affected as long as they would be represented by one union or another. Old Oak failed to recognize the right of its employees to select a bargaining agent of their own choice.

228. In this last respect, Old Oak's actions were somewhat akin to those of the employer in *The Corporation of the City of Sault Ste. Marie*, [1991] OLRB Rep. Sept. 1091. In that case, the CUPE held bargaining rights in respect of City employees, including those responsible for maintenance work. Subsequently, the Labourers obtained bargaining rights for construction employees. The City maintained throughout collective bargaining that it would only employ CUPE members in the work that the Labourers' claimed. The City refused to consider any of the Labourers' proposals regarding subcontracting of bargaining unit work. The Board found that the City's conduct amounted to a refusal to recognize the bargaining authority of the Labourers. In the instant case, Old Oak acted with similar anti-union animus with respect to the Labourers. Although the employer had no objection to its guards being represented by the UPGWA, it was evading the employees' selected bargaining agent, the Labourers.

229. I conclude that Old Oak intended to remove the Labourers from its workplace without regard to the wishes of employees. This constituted interference in employees' selection of a trade union, in violation of section 70 of the Act. And as the Board concluded in the *City of Sault Ste. Marie* decision, I find that Old Oak's actions amounted to the refusal to recognize the bargaining authority of the union as contemplated by section 43(2)(a) of the Act.

230. For all of these reasons, I have concluded that: (i) Old Oak violated section 17 of the Act by failing to bargain in good faith; and that (ii) the process of collective bargaining has run its course, and was unsuccessful because of the employer's actions aimed at avoiding the Labourers' bargaining rights and the employer's failure to make reasonable or expeditious efforts to conclude a collective agreement.

* * *

231. One aspect of the hearing requires some comment.

232. At several points in the hearing, Old Oak sought to expand its defence to the bad faith bargaining complaint. I should note that Old Oak's pleadings were submitted by a law firm different

from the firm that eventually represented the employer at the hearing; nonetheless, new counsel relied on the original pleadings and did not seek to amend them until many days into the hearing.) In particular, the employer sought to offer positive business rationale for its decision to contract out security services to Burns. I ruled orally that Old Oak could not amend its defence; in summary, I found that the request had come too late in the hearing and the applicant would be irretrievably prejudiced because it had already called its case in full and because it had already conducted numerous cross-examinations of employer witnesses that it might have conducted differently had it been responding to such a defence.

233. After ruling against the request to amend pleadings, Old Oak nonetheless attempted to lead evidence regarding business rationale for the decision to contract out. And although I upheld objections to examination-in-chief on that point, witnesses nonetheless managed to include in their testimony that which I had ruled inadmissible in evidence. In argument at the close of the hearing, Old Oak asked that I consider those statements. Although I would not rule (and do not so rule) that the evidence became admissible merely because witnesses disregarded my rulings and uttered the statements, I think it would be of some use to Old Oak for me to offer some comment on the import of the evidence and the defence that they wished they had put forward from the start of the case.

234. Greg Bierbaum said that the decision to contract out did not relate to dislike for unions or the Labourers in particular. Rather, Old Oak was concerned about its managerial inexperience in dealing with unions. They wanted "someone who had the resources to manage a union security [workforce] for [them]". Jim Reilly used similar words. He added that he had no experience in dealing with union personnel. He also thought it would be useful for him to spend less time in employee supervision and more time on other building management matters.

235. I have no cause to rule on the sufficiency of this proposed additional defence to the claim. Yet I would comment that the purported business rationale for the decision to contract out would not necessarily alter a finding that Old Oak was motivated at least in part by desire to remove the Labourers from its workplace. In other words, it seems unlikely that some legitimate business reason for the employer actions would dispel the taint caused by the anti-union motives that I have described.

IV. DECLARATIONS AND ORDERS

236. The employer application in File No. 3132-95-R to terminate the union's bargaining rights is hereby dismissed.

237. In respect of File No. 2199-95-U, the Board declares that the responding parties violated sections 17 and 70 of the Act.

238. In respect of File No. 3047-95-FC, the Board hereby directs that the first collective agreement be settled by arbitration.

3084-95-JD Labourers' International Union of North America, Local 247 v. United Brotherhood of Carpenters and Joiners of America, Local 249 and T. A. Andre & Sons (Ontario) Ltd., Responding Parties

Construction Industry - Evidence - Jurisdictional Dispute - Practice and Procedure - Labourers' union and Carpenters' union disputing assignment of work in connection with stripping of formwork where forms are to be re-used - Board expressing view that assignment should have been made to composite crew and seeking further submissions from the parties regarding

the appropriate composition of the crew - Board also taking opportunity to comment on materials filed and noting that correspondence from employers respecting their practice should, to the greatest extent possible, be the work product of the employer and not the party submitting the material to the Board - Board finding "standard form, fill-in-the-blank" letters to be of little utility - Board also declining to place any weight on "general" declarations prepared by members and filed by union where accuracy of declarations difficult to judge

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

APPEARANCES: *John Moszynski* and *Victor Claro* for the applicant; *David McKee* and *Dennis Grant* for Carpenters Local 249; *Kevin Kelly* and *J. Thomson* for T.A. Andre & Sons (Ontario) Ltd.

DECISION OF THE BOARD; August 21, 1996

1. This is an application concerning a work assignment filed with the Board pursuant to section 99 of the *Labour Relations Act, 1995* (hereinafter "the Act"). A consultation with the parties was held by the Board on May 15, 1996, at which time the written submissions of the parties, previously filed, were elaborated upon by counsel and Mr. Kevin Kelly, the General Manager of T. A. Andre & Sons (Ontario) Ltd. (hereinafter "the employer"). For convenience, the applicant will be referred to in this decision as "the Labourers" and the responding party, United Brotherhood of Carpenters and Joiners of America, Local 249, will be referred to as "the Carpenters".

2. The work in dispute in this proceeding is the stripping of formwork where the forms are to be reused. The work includes the dismantling of all components of built-in-place forms and the disassembly of all panel forms. The formwork in question relates to the construction of two plants in Millhaven, which is located in Board Area 29. The formwork undertaken by the employer at both plants consists of utilizing a combination of prefabricated panel forms and built-in-place forms.

3. There is no dispute that members of the Carpenters have been properly assigned the work of erecting all of the forms in question. The dismantling of the forms, which involves the removal of braces, strongbacks, whalers, studs and plywood (in the case of built-in-place forms) and of braces, strongbacks and whalers (in the case of the prefabricated panel forms) is the focus of the dispute. The dismantling of the forms is effected through the use of sledge hammers and crow bars. We note here that there is no dispute that the release of the various clamps and wedges which hold the form in place has been properly assigned to members of the Carpenters. Nor is there any dispute that the employer has quite properly assigned the work of stripping of forms which are not to be re-used to members of the Labourers.

4. The briefs submitted by the parties were contradictory in their description of the events which precipitated the work assignment dispute. A great deal of effort was expended by the parties in an attempt to establish the party to whom the work in dispute was initially assigned. It is evident from all of the materials that the employer did not make an assignment of the work to either the Labourers or the Carpenters at any time. The employer did not make an assignment at the mark up meeting held on May 5, 1995. Subsequently, it assigned the work in dispute to one or both of the trades claiming the work. In our view, the employer never really assigned the work in dispute at all. Nonetheless, having regard to the provisions of section 99 of the Act, this work assignment dispute is properly before the Board.

5. When determining a jurisdictional dispute application, the Board takes into account a number of criteria including, but not limited to, the various collective bargaining relationships affecting

the work in dispute, the skills and training required to perform the work, considerations of economy and efficiency, any relevant trade agreements, the employer's practice, and the area practice.

6. Both the Carpenters and the Labourers have a collective bargaining relationship with the employer. Both of the province-wide collective agreements assert work jurisdiction over the work in dispute. The Labourers' I.C.I. agreement describes the work in greater detail, but there is no question that both trade unions assert jurisdiction over the work in dispute.

7. In our view, the factors of economy and efficiency, and skills and training, do not have particular relevance in the circumstances of this application. There is no suggestion that employing either carpenters or labourers to perform this work requires an uneconomical or inefficient use of the employer's human resources. Furthermore, it is evident that members of both the Carpenters and the Labourers can perform the work in dispute. Although the brief filed by the Carpenters alludes to an historical basis for the assignment of the work in dispute to its members (i.e. that its members will maximize the salvage and re-usability of the materials because these same workers build the forms), this rationale was questioned by the Board over 25 years ago (see *Fraser-Brace Engineering Company, Limited*, [1969] OLRB Rep. Jan. 1087, at para. 45, where it was observed that "any skills that are needed can as easily be acquired by labourers as carpenters from experience on the job").

8. In its written submissions, and at the consultation, the Labourers relied upon the oft-cited but rarely helpful "Memorandum on Concrete Forms" dated October 3, 1949 as constituting a trade agreement which gave it a greater claim to the work in dispute. We are of the view that that document is of no assistance. In *Fraser-Brace Engineering Company, Limited, supra*, the Board, at paragraphs 15 and following, identified in great detail the difficulties that existed at that time in discerning the meaning of the language used in the Memorandum. There is nothing before the Board to suggest that the document's meaning is any more discernible in 1996. Accordingly, we do not place any weight on the document for the purposes of this decision.

9. There was a great deal of material filed with the Board relating to the employer's past practice and the area practice. With respect to the practice in Board Area 29, the materials filed consist primarily of "form letter-style" correspondence and/or practice sheets provided by the trade unions to general contractors or concrete forming contractors for completion. Leaving aside the issue (discussed below) of what weight, if any, such documents should be given, we note that the documents simply do not support a finding that there was any predominate area practice relating to the stripping of reusable formwork. The Carpenters included in its materials correspondence from the General Manager of the Kingston Construction Association, which correspondence contains his opinion of area practice - that "where re-usable lumber is to be stripped, the work belongs to carpenters...". However, it would appear from all of the materials filed with the Board that the actual practice of general contractors and concrete forming contractors in Board Area 29 is not quite as consistent as was suggested by the Association.

10. We think it important, at this point, to make a few observations regarding the nature of the materials filed with the Board in this proceeding. It has been more than three years now since the Board has been consulting with the parties respecting jurisdictional disputes rather than holding a hearing and requiring the parties to call evidence respecting the various criteria relied upon by the Board in determining these applications. In order to establish the practice of contractors in the relevant Board Areas, parties to jurisdictional dispute applications have regularly filed with the Board "employer practice sheets" or correspondence from employers respecting their practice in the pertinent Board Area. There is nothing wrong with this practice and materials which include specific details of the projects on which the work was performed and a clear description of the work performed can be quite helpful in establishing an area practice. However, the materials should, to the greatest extent possible, be the work product of the employer and not the party submitting the material to the Board.

11. In this particular proceeding, the correspondence of contractors respecting their area practice which was filed by the Labourers were, for all intents and purposes, identical. The Labourers apparently provided certain employers with draft letter for completion and signature. The difficulty with such “standard form, fill-in-the-blank” letters is that the Board cannot be certain that individuals signing the correspondence actually read and understood what they signed. Such concern is proved well-founded in this case, by one contractor who appears to have signed such a letter in support of the Labourers and then, subsequently, to have signed a declaration on behalf of the Carpenters denying same, and asserting an area practice consistent with the Carpenters’ claim. Naturally, each of the trade unions urged the Board to put weight on its materials and to reject the other’s documents. Ultimately, the evidence is of little utility. In order to avoid these problems, contractors should be freely encouraged to describe in specific detail their area practice(s) in their own words, rather than in someone else’s, providing details of the jobs and the work upon which such practice was established. Although the Board will have to remain cautious when considering these materials, there will be no doubt as to the contractor’s understanding of what is being asserted as an area practice.

12. The employer’s own practice with respect to the stripping of reusable formwork is, oddly enough, not clear. The Carpenters, in an attempt to establish the employer’s practice (both within and outside of Board Area 29), filed with the Board numerous handwritten declarations, signed by its members, which were said to establish that the employer’s consistent practice was to assign the work in dispute to members of the Carpenters. These declarations are hardly “boilerplate” in nature, and therefore their weight would not be discounted on that basis. Unfortunately, it is apparent that many of the declarations clearly overstate the case for the Carpenters. As noted above, it was not in dispute that the employer has, historically, properly assigned the stripping of the form to members of the Labourers when the wood was not to be reused. Notwithstanding that, a number of the handwritten declarations filed by the Carpenters make assertions such as “the ... stripping of all formwork was to be carried out by carpenters of local 249...” and “Labourers didn’t do any stripping of forms”. As we know that this is not accurate, what value can be placed on these declarations, keeping in mind that they are prepared by members (or, on occasion, by retired members) of one of the parties claiming the right to perform the work in dispute?

13. We have concluded that no weight can be given to the type of member declarations filed in this proceeding. As noted above, their authenticity is unquestioned. However, because of their “general” nature their accuracy is often hard to gauge, and in light of the inaccuracies that do appear on the face of some of the declarations, there can be no weight ascribed to the documents filed in this proceeding.

14. The material filed by the applicant included correspondence by Mr. Kelly which described, as he understood it, the past practice of the employer in assigning the work in dispute, both within and outside Board Area 29. Mr. Kelly asserted, during argument, that it has been the past practice of the employer to assign the work in dispute to labourers. Unfortunately, the correspondence filed by the applicant, authored by Mr. Kelly, hardly supports that assertion. In fact, it is not evident that the employer’s own practice is or has been to assign the work in dispute to any one trade.

15. Throughout the correspondence, Mr. Kelly asserts that, with respect to a significant number of projects, it has been the employer’s practice to perform the work in dispute “by a composite crew of labourers and carpenters”. We understand the use of this term to mean something different than using carpenters to strip reusable formwork, and labourers to strip non-reusable formwork. Mr. Kelly’s letter closes with this statement: “... in the three different Board areas ... both area practice and employer practice was to have stripping carried out by the labourers, although carpenters may be involved from time to time.” Our overall sense of the employer’s materials suggests that, if anything, both carpenters and labourers have performed the work in dispute for the employer. This is consistent with the observation made by Mr. Pollock, one of the employer’s representatives at the May 5, 1995 mark-up

meeting, which is contained in the minutes of that meeting. At that meeting Mr. Pollock asserted that "it was common practice to have the available trade strip formwork. If the carpenters were busy, the labourers would strip and vice versa, or a mixed crew would be used". This could very well explain the diversity of the conclusions which each of the unions asked the Board to reach.

16. We are of the view that the assignment of this work ought to have been made to a composite crew, consistent with what appears to have been the employer's own practice over the years. At the consultation the parties did not address this potential result. Accordingly, the parties are directed to provide the Board with any submissions they may have regarding the appropriate composition of the crew no later than September 16, 1996. As usual, should the parties be able to reach an agreement amongst themselves as to the appropriate composition of the crew, it will be unnecessary to make the submissions directed.

17. We will remain seized of this proceeding.

4142-94-R United Steelworkers of America, Applicant v. University Hospital, Responding Party

Bargaining Unit - Certification - Union seeking to represent bargaining unit of secretaries employed by hospital - Hospital asserting that proposed bargaining unit not appropriate and arguing that the secretaries at issue should be treated as part of larger bargaining unit of clerical employees - Board finding that union's proposed unit not appropriate - Certification application dismissed

BEFORE: *Christopher Albertyn*, Vice-Chair, and Board Members *W. H. Wightman* and *K. S. Brennan*.

APPEARANCES: *James Hayes, Jeffrey M. Andrew, George Ross, Debbi Harley, Freda Northover, Carole Sutherland* and *Bill Gibson* for the applicant; *Frank Angeletti* and *Paul Faguy* for the responding party.

DECISION OF CHRISTOPHER ALBERTYN, VICE-CHAIR, AND BOARD MEMBER W. H. WIGHTMAN; July 11, 1996

1. This is an application for certification filed under the *Labour Relations Act* prior to its 1995 amendment, hence not subject to the current provisions concerning the certification process.

2. There is one issue in dispute between the parties: the description of the appropriate bargaining unit. The union seeks to be certified for a group of secretaries employed by the hospital, known as GFT secretaries (or "GFTs"); the hospital contends that they do not constitute a distinct group suitable for a separate bargaining unit. The hospital argues that the GFTs should be treated as part of a larger bargaining unit of clerical (secretarial and office) employees. The parties have agreed that if the Board finds that the GFT secretaries constitute an appropriate bargaining unit, then a certificate to that effect should be issued to the applicant, and, if the Board finds that that is not an appropriate bargaining unit, then the application should be dismissed because the applicant does not have sufficient support within the larger clerical unit proposed by the hospital.

3. The responding party will at times be referred to as "University Hospital", or "the hospital" or "the employer".

4. The responding party is a large hospital in London, associated with the Medical Faculty of the University of Western Ontario. At the time of the application it employed approximately 2,700 people. University Hospital has recently (October 1995) merged with Victoria Hospital to form a single large hospital for the City of London. The merger occurred subsequent to the filing of the certification application on February 21, 1995. That development will not influence this decision, which will be founded upon the circumstances that existed on the date of the certification application.

5. The hospital serves approximately half a million patients a year, most of whom are out-patients. About 75% of the patients come from outside of the City of London. It is a community and a teaching hospital with an affiliation agreement with the Faculty of Medicine of the University of Western Ontario. As a teaching hospital, it tends to deal with more specialized, more acute kinds of care. University Hospital itself now has approximately 2,500 employees, of whom about 400 are unionized, and about 2,100 are not. The 400 unionized employees are in the service or maintenance sector.

6. In evidence the employer produced a current breakdown of the existing bargaining units within the new merged structure of Victoria/University Hospital. While our decision is based upon the facts and circumstances that existed on the date of this application (February 21, 1995), our decision will impact upon current circumstances at the hospital. For that reason we note the current bargaining units at Victoria/University Hospital. At Victoria Hospital there are 4 bargaining units: registered nurses (approximately 1,100 employees); service employees (1,000); clerical employees (400); and technical employees (500). There are 900 employees who are not unionized (including doctors and management). At University Hospital, using management's categories, there are 400 employees in the service employees bargaining unit (represented by the Service Employees' International Union). That unit is composed of housekeeping, dietary and maintenance employees and porters. The other hospital employees are not unionized, including the GFTs whom the union seeks to represent through this application. The other categories of employees are the following (with approximate numbers of workers in each): 900 registered nurses; 500 clerical employees (of whom 99 are GFTs - the group who seek a bargaining unit in this case); 400 technical employees and 300 others (doctors and management).

7. GFT secretaries make up less than 4% of the hospital's employees, and less than 25% of its clerical and administrative employees. The category of clerical and administrative employees (referred to by the employer as "the SOS group" - the Secretarial and Office support staff) includes the following: clerk typists; dicta-typists; secretaries; medical secretaries; GFT secretaries; program secretaries; communications and financial clerks.

8. The term "GFT" is an abbreviation for 'Geographic Full-Time' secretary, a category of secretary created when the hospital was originally staffed in 1972. That description no longer has any meaning. In about 1993 the GFT secretaries, through their association, the GFT Secretaries Association (sometimes referred to hereafter as "the Association"), considered a job title name change to a name which more appositely described their particular work. They recommended to management the substitution for their job title of the term, "Medical Administrative Assistant". That suggestion was not adopted, and the title "GFT Secretary" remains. What makes a secretary distinctively a GFT secretary has less to do with geography than with the fact that she provides secretarial and administrative support for a specific specialist physician (a GFT physician), rather than for the hospital itself. The GFTs are employed by the hospital, although, for each of them, their day-to-day work is done for a specific physician. The physicians for whom the GFTs work are dispersed throughout the hospital, and each such physician has his/her own financial arrangement with the hospital.

9. The physicians are part of the hospital's teaching function. About 75% of the physicians employed at the hospital have no teaching responsibilities. The GFT secretaries work for about 25% of

the physicians, i.e. those who have teaching responsibilities. Other secretaries work directly for the hospital and are allocated work according to the hospital's clerical requirements. The physicians for whom GFTs work are specialists engaged in private clinical practice, teaching and research in association with the Faculty of Medicine at the University of Western Ontario ("the university"). Secretarial and most administrative employees of the hospital, other than GFTs and a few clerical employees, are paid out of the normal operating budget of the hospital. GFT secretaries and a small number of other clerical employees, are paid by the hospital as its employees, although the sources of funding of their salaries are fourfold: the Clinical Education Budget of the hospital from the Ministry of Health; training and research funding which is made available to the university through the Ministry of Health and the Ministry of Colleges and Universities; the physician's personal expense of practice; and the hospital global budget.

10. The relationship between the physicians, for whom the GFTs work, and the hospital requires some explanation. The physicians are in a position somewhat equivalent to tenants in their relationship with the hospital. Each physician negotiates his/her own financial arrangements with the hospital, or a new physician will negotiate his/her relationship with a department of physicians, who, as a group, negotiate a particular financial arrangement with the hospital. The physicians (or department of physicians) contribute different amounts in respect of the opportunity to conduct their medical businesses and research associations with the hospital. In return for the consideration paid by the physician or department of physicians concerned, the hospital provides medical and office equipment and all necessary employees and professional help, including one or more GFT secretaries. A physician's office and medical equipment and supplies, which are not provided by the hospital, are generally purchased or leased independently by the particular physician or department of physicians.

11. GFT secretaries are one classification among many within the job category, 'secretary', within the hospital. The full list of secretarial positions within the hospital includes over 80 classifications. Each secretarial position falls within a particular job grade, and the GFT secretaries' job grade is the same as that of certain other secretarial positions.

12. During the course of the hearing, at counsel's request, we directed counsel for both parties to the issues we considered would best focus our consideration of the matter in dispute between them. Our basic inquiry is whether the GFT secretaries should be separated from the general body of clerical and administrative staff at the hospital for the purpose of collective bargaining - in other words, whether, on their own, they constitute an appropriate bargaining unit. To assist in our inquiry, we suggested that the parties might direct their evidence and argument to the following points of possible relevance to our consideration of whether or not the GFTs are a distinctive group, and whether or not that distinctiveness is sufficient to constitute them as an appropriate bargaining unit: qualifications; duties; work environment; supervision and discipline; terms and conditions of employment, e.g. wages, vacation entitlements, etc.; the circumstances leading to termination of employment and the differences in job security; any ancillary terms of employment - particularly the suggestion that GFTs receive additional income from their 'own' physicians; the filling of GFT vacancies; the role of the GFT Association, of which more below; the functional dependence/inter-dependence with other hospital employees, particularly clerical employees; and information concerning other bargaining units. We have already mentioned the information concerning other bargaining units above. Our description of the evidence in respect of the other categories of possible distinctiveness follows.

Qualifications

13. The qualifications typically required of GFT secretaries are the following. They should have completed a two-year Community College Medical Secretarial Program or obtained a Medical Administration Assistant Certificate or its equivalent in formal medical-business training. The GFT

secretary should have a minimum of 2 years experience in a specialist physician's office. She (at material times to this application there were no male GFTs) should have the ability to work independently, with experience of word processing and computerized OHIP billing (preferably WordPerfect 5.1, WP Office, Reference Manager and the Don Wallace Automated OHIP Billing System). The GFT should be able to communicate effectively and professionally with all staff, patients and others, and she should be able to work independently and maintain confidentiality. Most GFTs are required to have the ability to manage research accounts.

14. These qualifications are slightly different from those required of other medical secretaries. The GFTs qualifications are somewhat superior to most other secretarial positions, but they are not so different as to suggest an acute or marked distinction.

Duties

15. The duties of GFT secretaries are fully described in a document dated February 1993, produced as Exhibit 3, Tab 24 at the hearing. That description includes the following duties: managing the physician's office efficiently and effectively; prioritizing and organizing work; answering and dealing with the physician's telephone calls and reception responsibilities; typing of in-patient and out-patient summaries, consultation notes, research manuscripts, grant applications, committee reports, general reports, minutes, correspondence; scheduling of the physician's day-to-day operations, including out-patient appointments, hospital admissions, laboratory and diagnostic tests, surgeries, dictatyping, teaching, meetings, and the physician's travel; filing documents and records; preparing billings of the physician's consultations to OHIP and to other agencies; communicating with patients, staff and associates.

16. Many of these duties would be done by other secretarial and clerical employees. The particular combination of the GFTs' duties is distinctive, but other combinations of the same kinds of duties are performed by various categories of administrative and secretarial employees.

Work Environment

17. GFTs work for, and are accountable to, individual physicians. They are not alone in having that mediated relationship to the hospital. Other non-GFT secretaries, though few in number, also report directly to physicians.

18. GFT Secretaries are dispersed throughout the hospital. They tend to work alone, for a specific physician, as a personal, administrative and secretarial assistant.

19. GFT secretaries are not alone in working for (GFT) physicians who have an arm's length relationship to the hospital. Approximately 155 employees, including 99 GFTs, report to physicians. To all intents and purposes they share with the GFTs the features of relative isolation from other administrative employees, dependence upon the physicians and relative precariousness in their employment.

Supervision and discipline

20. The physicians, for whom the GFT secretaries work, are effectively their managers. When a physician decides that discipline is warranted s/he would typically consult with the hospital's Human Resources Department before taking any action. That is not always the case, but it is mostly. In this regard, GFT secretaries are treated no differently from other clerical or administrative employees, who would be subject to equivalent managerial discipline.

Terms & Conditions of Employment

21. The hospital is responsible for, and administers, the payroll of all employees, including the GFT secretaries. The hospital pays their salaries and benefits. The amounts contributed by the various physicians to the hospital in respect of the services provided by the hospital (medical and office equipment, consulting room space, GFT secretarial and other administrative assistance) are paid directly to the hospital and not to the GFTs themselves. The hospital treats the GFTs as its employees.

22. The physician employing a GFT secretary will have some say over her starting salary. The actual amount will be determined by agreement between the physician and the GFT secretary concerned. But, in advance of such agreement, the physician will consult with the hospital's Human Resources Department to determine where on the salary grid the GFT secretary should be placed. The HR Department will ensure that the GFT secretary employed is not paid a salary which will be at variance with that earned by GFT secretaries and other secretaries of equivalent qualification who are required to perform similar work of commensurate responsibility. GFT secretaries are classified as Grade 34 in the hospital's grading system. Once located on the staff salary grid, a GFT secretary will receive the increases and adjustments to salary and benefits which apply to all secretarial, administrative and clerical employees.

23. A pay equity plan was presented to all secretarial staff as one group, inclusive of GFTs. Under a job-to-job comparison for the purpose of establishing pay equity goals had they been treated as a distinct group, GFT secretaries would have received no pay equity adjustment had they been treated as a distinct group, but, as a result of grouping the GFT secretaries with other secretaries, the GFTs received the same adjustment as other secretaries.

24. All clerical and administrative employees, including GFT secretaries, are entitled to holiday and vacation benefits as provided by the hospital policy concerned. GFT secretaries get the same vacation entitlement as do other secretaries, except for secretaries to vice-presidents, who are given more vacation. Similarly, the hospital's leave of absence policy and its lay-off policy apply in the same way, and with equal force, to the GFT secretaries as they apply to other administrative and secretarial employees.

25. Hiring of GFT secretaries is somewhat distinct from that of other secretarial and administrative employees. The physician for whom the GFT secretary is to work has considerable say over the appointment. At times a physician will bring his/her own secretary with him/her upon taking a position at the hospital, and that secretary will become his/her GFT secretary. If a new physician does not bring his/her own secretary, and decides not to keep the incumbent GFT secretary, the GFT position will be posted at the hospital as are other clerical positions. Upon posting of a GFT vacancy, like other administrative positions, the hospital's Human Resources Department will screen the candidates, although the final decision on the selection will be made by the physician concerned. That would apply too to other appointments. The head of department or the individual manager, in consultation with the hospital's Human Resources Department, would make the actual selection of the person who will be appointed to the vacant position.

26. The formal procedure for the appointment of GFT secretaries to job vacancies is the same as that for all other employees. It is contained in the hospital's policy manual. It is also described in a memorandum dated December 2, 1993, which somewhat modifies the general procedure, as follows:

• • •

- * Employee Relations provides the physician with the files of *all* candidates who meet the job requirements.

- * The physician decides which candidates he/she will interview.
- * The physician interviews those candidates.
- * The physician selects the most senior person with all the qualifications.
- * The physician notifies Employee Relations of the successful candidate.

• • •

[T]he salary range will be included in every job posting.

27. Hours of work of GFTs, like other administrative, clerical and secretarial employees, are determined by the provisions of the hospital's policy manual. The hospital-wide overtime policy applies to all employees, although managers or physicians may make adjustments as required. Should a GFT secretary work overtime, her physician is obliged to send details of that overtime work to the Payroll Department. Similar arrangements apply to other secretarial and office employees. Overtime may be paid for, or compensated by time off in lieu of payment. Clerical employees are usually paid for overtime work, GFTs are more likely to get time off in lieu of payment.

28. GFT secretaries, like other administrative and secretarial employees, are subject to the policies and procedures manual of the hospital's Human Resources Department, including such matters as occupational health and safety; rest periods; homeowners' and automobile insurance; discrimination and harassment complaints procedures; jury duty; job sharing; paid holidays; parking; pension plans; personal appearance; personnel files; rehabilitation employment; termination and retirement.

29. The GFT Secretaries' Association produced a comprehensive Medical Secretaries' Resource Manual. It deals with all areas of responsibility of a medical secretary. It applies to all medical secretaries, not only GFTs. Other occupational categories within the hospital, e.g. health records clerks and patient registration clerks have their own resource manuals and, like the GFT secretaries, they were involved in producing and revising their manuals.

30. The hospital provides occasional training programmes for its employees. GFT secretaries are expected to, and do, attend.

Ancillary terms of employment

31. There was some suggestion in the evidence of Mrs. Debbi Harley, the GFT secretary who testified at the hearing, that some, though not all, GFT secretaries receive some additional income from the physician for whom they work besides their salary paid by the hospital. The suggestion was that this income is non-contractual, informal and unrecorded, supplementary to their normal salaries. Given the somewhat discretionary nature of this remuneration, no details of payments are kept, nor was any specificity given to this evidence, but its implication is that the "topping up" of the GFT secretaries' salaries makes their employment somewhat different or distinct from that of other administrative or secretarial employees. For example, GFT secretaries might receive a benefit like a Christmas bonus, or a gift at Christmas, or an honorarium for assisting in conference organizing or preparation.

32. The hospital's witness, Mr. Faguy, the current Human Resources Director, was aware of few instances of supplementary, non-contractual consideration paid by a physician to a GFT secretary, but he explained that any such payment was not part of the employment relationship between GFT secretaries and the hospital, and that he would seek to ensure that it ceased because it had the potential for creating rivalry and resentment. Also there was the possibility of a GFT secretary seeking to claim such unauthorized income as part of her remuneration. That risk would impact upon the hospital.

Job security

33. When a particular physician leaves the hospital and the physician concerned is not replaced, the practice is for the GFT secretary concerned to be terminated by reason of redundancy. If a physician leaves and is replaced, the new physician may bring someone with him/her, in which event the GFT secretary will be made redundant. If a physician is replaced by a physician who does not bring his/her own secretary, then the new physician will decide if the incumbent GFT secretary is qualified to perform the secretarial and administrative work required in his/her practice, in which event the GFT secretary will be retained. If she lacks the necessary qualifications, she will be laid-off by the hospital. There is no automatic right to bump or transfer into other clerical positions within the hospital. The GFT is treated as being laid off and the provisions referred to below apply. The reason that the GFT secretary is likely to be laid off when her physician leaves is because the in-coming physician, who has a relatively independent association with the hospital, has the right to determine who should be appointed as his/her personal GFT secretary. The physician and his/her GFT secretary need to be able to work well together, so the GFT secretary is in the position of a personal assistant to the physician. Her appointment is therefore largely determined by the physician for whom she will work. For that reason the term of her appointment does not necessarily extend beyond the period of association between the physician and the hospital.

34. The job security of non-GFT secretaries who work for individual managers and departmental heads is not dissimilar from that of GFT secretaries, although it is somewhat greater in practice. If a manager or departmental head leaves the hospital and is not replaced, his/her secretary is declared to be redundant. That is no different from what would happen to a GFT secretary. If a manager or departmental head leaves and is replaced, and his/her role remains substantially the same, then the incumbent secretary would retain her position. That is different from the GFT secretary's position in equivalent circumstances. As stated above, in such a circumstance, the incoming physician may yet decide not to keep the GFT secretary concerned. If the role or function of the manager or departmental head changes, and that change were sufficient to alter the secretary's duties significantly, then there would be a job posting.

35. The precariousness described above in respect of GFT's employment tenure applies not only to GFT secretaries, but to all secretaries who report to particular, individual physicians and heads of departments, although, in practice it appears that the GFT secretaries are less likely to be retained by in-coming physicians than is the case in other sections of the hospital. The GFT will usually be laid off when the physician for whom she works ceases his/her association with the hospital. That condition does not apply to the appointment of administrative and clerical employees, and it applies with less frequency to other secretarial employees. Their positions are less precarious than those of the GFTs. When the person for whom they perform secretarial work leaves and is replaced, they are likely to remain as the incumbent secretary for the position they occupy. They are clearly employed in a particular position for the hospital, whereas the GFTs work for a particular physician and their job security is likely to last only for so long as that physician remains with the hospital. This is an important difference in the terms and conditions of employment of the GFTs as compared to administrative, clerical and most other secretarial employees.

Transfers, Lay-offs and Terminations

36. If a GFT secretary is temporarily absent from work, she may arrange for her temporary replacement by an out-of-work or laid off GFT secretary who wants temporary work. As far as possible, GFTs try to arrange for a GFT casual or temporary replacement because she would be familiar with the work. If no such arrangement is or can be made, then the temporary replacement will be supplied from

the hospital's Secretarial Casual Float Pool. There is no separate float pool for GFT secretarial replacements; GFT replacements are supplied from the Secretarial Casual Float Pool.

37. The hospital permits employees to transfer into posted positions which they are qualified to perform. All applications for transfer within the hospital, including GFT secretarial transfers, are submitted to the hospital's Human Resources Department.

38. GFT secretaries have transferred into vacant non-GFT secretarial or administrative positions, and non-GFT secretaries have transferred into GFT secretarial positions. Such transfers are not common, but they do occur. Several instances of such transfers were presented in evidence at the hearing.

39. In the event of a physician leaving the hospital and his/her GFT secretary being laid off, the affected GFT secretary is subject to the hospital's lay-off policy, applicable to all employees. The GFT secretary has one of three options: she can accept a vacant position if one is available and suitable; she can accept the lay-off with severance pay and no right of recall; or she can accept the lay-off with a right of recall, but without severance pay. The hospital offers a voluntary exit or early retirement programme to all clerical and secretarial employees, including GFT secretaries.

40. GFT secretaries are treated like all other administrative and secretarial employees when their employment is terminated. The procedure is carried out by the Human Resources Department and any problems arising are dealt with by that department.

The Role of the GFT Secretaries' Association and other employee associations

41. In about 1980 a GFT Secretaries' Association was formed. The Association has been officially recognized by the hospital administration. All GFT secretaries are members of the Association. There is no membership fee. Meetings of the full Association are called four times a year. Elected GFT representatives on each floor of the hospital attend a monthly working committee meeting. Dr. Stuart, until recently the hospital's Vice-President of Medical Services, and two GFT physician advisors attended meetings of the working committee.

42. During the course of its existence the GFT Secretaries' Association has been represented in various committees and structures of the hospital, including those concerned with health & safety, employment equity, out-patient scheduling, sick-time utilization, client counselling, stress management, quality of working life, office automation, secretarial clerical education, employee development, the hospital sector training and adjustment program, medical secretary orientation, the Form 106 Project (to standardize the patient registration form) and Fanshaw College work placement. Many of these committees no longer function, but they existed at various times in the past, and some continue to function. There was some dispute between the parties as to whether the presence of a GFT secretary on a hospital task force or committee constituted representation of the GFT Secretaries' Association, or merely representation by a GFT secretary of the general body of secretarial and administrative employees. In reality the representation probably had elements of both. In certain instances the GFT Secretaries' Association was expressly requested by the hospital administration to elect a representative to sit on a particular committee, e.g. the Occupational Health & Safety Committee, and at other times a GFT secretary was appointed to a committee, other than as a result of a request to the GFT Secretaries' Association, and without the prior sanction and approval of the Association. We do not doubt, though, that the GFT Secretaries' Association would have been aware of which of its members were serving on what committees, and in all probability many, if not all, of the representatives would have regarded themselves as being answerable to the GFT Secretaries' Association. The GFT Secretaries' Association also served on the downsizing task force, the out-patient business group and it made recommendations concerning the implementation of pay equity in the hospital. In summary, the GFT Secretaries'

Association was a recognized representative group of its members, and a participant in the administrative and consultative structures of the hospital.

43. The GFT Secretaries' Association has acted on behalf of its members in a forum outside of the hospital in relation to work practices at the hospital. The Association appealed to the Pay Equity Commission against the scheme of implementation of the *Pay Equity Act* by the hospital administration. The Association sought to have the GFT secretaries treated as a distinct group. Following discussions with the Human Resources department of the hospital much of the dissatisfaction of the GFT secretaries was addressed, and the Association withdrew their appeal, accepting that GFT secretaries would be treated as part of the secretaries' group. In this instance, the GFT Secretaries' Association acted as the collective voice of the GFTs, representing their interests in relation to their employer.

44. The GFT Secretaries' Association still exists and functions, although its heyday appears somewhat to have passed. That is, in part, the consequence of the hospital's former Vice-President of Medical Services, Dr. Stuart, retiring from the hospital (he played an important supportive and facilitative role in relation to the GFT Secretaries' Association) and, in part, because the hospital's HR department has promoted the establishment of a wider administrative - secretarial association, known as the SOS Association, which better accords with management's view of the grouping that should compose an appropriate bargaining unit. The SOS Association was established in 1993, although it did not really start functioning until January 1994. It resulted from the merger of two pre-existing committees of clerical workers, the Office Automation User Group and the Clerical Education Secretarial Group. The SOS Association has to some extent assumed some of the functions and purposes for which the GFT Secretaries' Association was formed, and in terms of which it acted. The GFT secretaries do not regard the SOS Association as replacing their own GFT Secretaries' Association, although, to some extent, that has in fact occurred. The GFT Secretaries' Association gave its blessing to the establishment of the SOS Association and certain GFT secretaries are active within that association, but for many GFTs their own association is still the proper vehicle for the expression of their mutual interests and for communicating collectively with management.

45. The GFT Secretaries' Association has been active for a significant period of time. Its elected committee members had regular meetings with Dr. Stuart, the Vice-President of Medical Services. There were minutes taken of virtually all of the meetings dating from November 18, 1982 to the present. There is a dispute between the parties as to the significance of the matters that were discussed and considered at the meetings between the GFT Secretaries' Association and management (represented almost always by Dr. Stuart). The hospital contends that the meetings were nothing more than an exchange of information and views between the GFT secretaries and management. The union suggested that the GFT Secretaries' Association meetings with management amounted to more than a mere conduit for information between the hospital's management and the GFT secretaries. The union concedes that the meetings fall short of being collective bargaining. According to the union, the role of the GFT Secretaries' Association lay somewhere between those extremes: more than merely a conduit for information; less than a fully fledged collective bargaining agent.

46. The kinds of issues addressed by the GFT Association were the following: a substantial procedures manual for GFT secretaries was drafted and distributed; a new job description of GFT Secretaries was drafted, which was ultimately accepted for use by the hospital administration; the Association sought to find positions within the hospital for GFTs who were on lay-off; it discussed with Dr. Stuart such matters as performance appraisals, sick relief replacement, secretarial replacements for vacation, job security, vacations, salaries, overtime, insurance and other benefits. The minutes of the GFT Secretaries' Association (during the period November 1982 until the present) reveal that several issues concerning terms and conditions of employment were addressed by the Association, meeting with Dr. Stuart.

47. Many of the issues discussed at the GFT Secretaries' Association meetings with Dr. Stuart appear repeatedly, meeting after meeting. Often that was to keep the issue alive when Dr. Stuart had not yet obtained a response from the responsible person in management, and the item was included on the agenda, or in the minutes, merely to ensure that it would appear under "matters arising" at the next meeting. Usually Dr. Stuart would undertake to revert to the meeting, and those present then moved to the next item on the agenda. Mostly an eventual report was made to the meeting on the issues raised, to say either that management could accede to a particular request, or it could not. More often than not, little came of the representations from the GFT Secretaries' Association. The Association's working committee was able to raise and discuss any issue it wished, including unionization and their own certification application, but the engagement with management worked principally as a means of management being informed of the kinds of issues which were of concern to the GFT secretaries. The Association also provided a means of ensuring GFT secretarial representation on various hospital committees. The Association was the conduit through which the views of the GFT secretaries were expressed and through which it was able to achieve some minor adjustments to the terms and conditions of employment affecting them.

48. In our view, the union's characterization of the role and function of the GFT Secretaries' Association accords better with the evidence than does the hospital's. We see the Association as having been a consultative body - more than merely the conveyor and recipient of information, but significantly less than a bargaining agent. The meetings between the Association's executive and Dr. Stuart were consultations on matters of material interest to the GFT secretaries concerning their terms and conditions of employment. The exchanges between Dr. Stuart and the GFT secretaries' representatives fell short of negotiation or bargaining, but they were more than the mere passing of information. Dr. Stuart consulted the GFT secretaries' representatives on matters that were likely to affect them. They raised with him matters of concern to them, and he investigated their concerns and, in due or sometimes lengthy course, responded to them. The GFT secretaries made proposals which were considered by management, and frequently management reverted with proposals of its own, seeking the comment of the GFT Secretaries' Association before making a decision. It is not clear to what extent the suggestions and recommendations of the GFT Secretaries' Association influenced management's decisions on the matters discussed, but their views were certainly considered by Dr. Stuart, who no doubt sought to advance their interests enthusiastically in the various forums of management. In our view, during the period when Dr. Stuart was the Vice-President of Medical Services, management had a consultative relationship with the GFT Secretaries' Association. The views of the GFTs were canvassed and considered by management. Decisions affecting them were made after consultation with their association's executive members. No doubt, at times, the recommendations of the GFT secretaries were accepted and management's thinking on various matters affecting the GFT secretaries altered on account of their representations. That state of affairs has declined somewhat in the period after Dr. Stuart's retirement. The relationship with management has become somewhat more distant and the trust given to Dr. Stuart is not so immediately apparent from the Association's more recent minutes.

49. During the heyday of the GFT Secretaries' Association, there was no equivalent organization of other secretarial, clerical or administrative staff. It appears that those employees had no comparable vehicle for communicating their views to management on the issues affecting their working lives. That changed when the SOS Association was formed and the hospital's Human Resources department sought to encourage the development of a general association of clerical, administrative and secretarial employees. The SOS [Support Office Staff] Association was formed ostensibly to represent the interests of all of those categories of employees, including the GFT secretaries.

50. After the establishment of the SOS Association, contact between management and the GFT Secretaries Association appears somewhat to have decreased. The contact it had formerly enjoyed with management was partially replaced and substituted by contact between management and the SOS

Association. Dr. Stuart retired from the hospital in about May 1995, and since then the meetings appear to have been without any representation from management. In fact, the last minutes submitted by the parties at the hearing, dated December 5, 1995, suggest that the hospital no longer recognizes the GFT Association.

51. The SOS Association has been recognized by the hospital's management to provide a vehicle for communication between all secretaries and other office support staff and a forum for all secretarial and office support staff to communicate with the hospital administration, and vice versa. There is some level of individual participation within that organization by GFT secretaries, but the GFT Secretaries' Association itself does not regard itself as having transferred any of its functions to the SOS Association, nor do they regard the SOS Association as having displaced their association.

52. The hospital's Human Resources Department's policies and procedures manual provides for the establishment of mutual interest groups. Employees who feel that they have a mutual interest may constitute themselves as a mutual interest group. Although the GFT Secretaries' Association had been in existence and functioned for some 14 years, in March 1994 and largely upon the initiative of the hospital's human resources department, the hospital saw fit to conclude an agreement with the GFT Secretaries Association, in a document headed, "Terms of Reference - GFT Secretaries & University Hospital - Mutual Interest Group". The terms of reference of the mutual interest group are described as follows:

University Hospital acknowledges the unique relationship which exists between the hospital as an employer and the GFT physician secretary as an individual employee. A Mutual Interest group will be formed in order to ensure full communication, understanding and to willingly co-operate with each other in the fullest sense.

The purpose of this group is to provide a structured method for the discussion of issues and the dissemination of information related to University Hospital and its unique relationship with GFT secretaries.

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Items for Discussion

Without excluding any items by the generality of this statement, any issue, change in policy, change in the general terms of conditions of employment or communications will be the subject of discussion at this group.

Conflicts, problems or opportunities related to all or some GFT secretaries will be the subject of consideration by this group.

Individual complaints or problems should not be raised at this group. These will be dealt with as a separate issue.

That agreement articulated what, in large measure, had been a function of the GFT Secretaries' Association until then, namely "a structured method for the discussion of issues and the dissemination of information". Ironically, at about the time that the relationship between the GFT Secretaries' Association and the hospital was formalized by conclusion of the terms of reference agreement, in March 1994, actual contact between the GFT Secretaries' Association and the hospital was to abate steadily. A meeting of the hospital and the GFT Secretaries, referred in the minutes as a 'mutual interest meeting', occurred on May 9, 1994. That was to be virtually the last formal contact between the hospital and the GFT Secretaries' Association. What had been a relatively busy relationship over a period of about 14 years, engaged in the discussion and investigation of issues of interest, a process of consultation and exchange of information, appears to have faded away.

53. Although not desired by the GFT Secretaries' Association, the SOS Association has to some extent supplanted their association as the medium of contact with management. That is largely management's recent doing. The human resources department of the hospital wishes to have one administrative, office and secretarial staff association which represents the unit of employees which that department believes should be the appropriate bargaining unit, were those employees to unionize. It has nurtured the SOS Association and allowed the GFT Secretaries' Association to fall somewhat into disuse. The SOS Association meets every month or two.

54. For the purposes of this application, we treat the application date as the date at which the circumstances and conditions at the hospital are to be addressed. At that date, February 21, 1995, the GFT Secretaries' Association was still active, Dr. Stuart had not yet retired and he still attended GFT Secretaries' Association and working Committee meetings and the cordial relationship between the Association and the hospital management, although somewhat in decline, was still largely intact.

55. The hospital has a Fiscal Advisory Committee which must periodically approve of the hospital's Operating Plan. The large clerical group of employees - which the hospital contends is the unit appropriate for collective bargaining - is represented on that Committee. There is no separate representation for GFT secretaries on the Committee. There is an Employee Benefits Task Force and an Occupational Safety Committee in the hospital. GFT secretaries are not separately represented in those bodies; they are represented as part of the larger clerical-secretarial group contended for by the hospital.

Functional independence/interdependence

56. GFT secretaries have a considerable degree of functional dependence upon other clerical and administrative employees, just as they are functionally dependent upon hospital employees of other occupational categories, such as nurses and technical employees. As stated above, GFT secretaries are dispersed throughout the hospital, located in the offices or consulting rooms of particular physicians, separated from one another and from most other employees. GFT secretaries tend, on a daily basis, to have greatest contact with the physician for whom they worked, and with the one or two other administrative or technical staff members working for the physician concerned.

57. The physicians for whom GFT secretaries work have not, until recently, been linked to the hospital's computer network. They have tended to have their own computers and software which the GFT concerned has had to learn to operate. However, the intention of the hospital is that there be a single network throughout the hospital which the physicians, through their GFTs, will have access to. That intention is being steadily realized, in that all sections of the hospital (other than the physicians) are now on line, and the physicians are gradually coming on line, as the network is extended. One purpose for having a single network is to centralize the patient registry so that the transfer of patients between the different services of the hospital can be better monitored.

58. Thus, although GFT secretaries have some functional dependence upon other hospital employees, they tend to work in relative isolation from the main body of administrative and secretarial employees. They are not alone in that regard. The secretaries of vice-presidents and those of departmental heads work in similar, relatively isolated circumstances.

59. On October 27, 1994 the Office and Professional Employees International Union (OPEIU) applied for certification as the bargaining agent for all administrative, clerical and secretarial employees of the hospital (the grouping which the hospital contends should constitute the appropriate bargaining unit). The hospital accepted that union's bargaining unit proposal. The OPEIU was unable to establish majority representation of that unit and its certification application failed.

60. The test in matters of this sort is not whether the bargaining unit proposed by the applicant is the best or most appropriate unit for the purposes of collective bargaining, but whether it is an appropriate unit, perhaps one of several possible bargaining units. The applicant's counsel argues that the GFT secretaries are a sufficiently distinctive grouping, with a history of concerted, collective identification with each other, with considerable experience of consultation with the hospital administration, and hence that they should be constituted as an appropriate bargaining unit. Counsel for the applicant argued that for 15 years the hospital had treated the GFT secretaries as a distinct group with separate representation of their own, and hence the Board should formalize that practice by declaring the GFT secretaries to be an appropriate bargaining unit.

61. Counsel for the hospital contends that any distinctiveness that exists concerning the GFT secretaries relates only to the peculiar relationship which obtains between the physicians, for whom the GFTs work, and the hospital. The distinctiveness arises from the hospital's special arrangement with the physicians, and not the circumstances of the GFT secretaries.

62. In our view there are several minor differences between the position of the GFT secretaries as compared to other secretarial or clerical employees, but they have no special significance. For example, the ancillary incomes of some GFT secretaries - the informal, gratuitous amounts paid or gifts given to GFT secretaries for work done beyond their regular or normal duties - are not of such significance as to suggest a material difference in the terms and conditions of employment of GFT secretaries vis-à-vis other secretaries and clerical employees. The benefit of the ancillary gratuities is not one which would be likely to be included in any process of collective bargaining because the value of the benefit appears to be more symbolic than substantive, and the evidence of the phenomenon does not suggest that it is particularly widespread among the GFT secretaries. In virtually all respects - qualifications, duties, work environment, supervision and discipline, terms and conditions of employment, mobility within the workplace and functional interdependence - the position of the GFT secretaries is not significantly distinguishable from that of other clerical, office and secretarial employees. (See in this regard, *Motor Coach Industries Limited*, [1992] OLRB Rep. June 744, at 745-6, paragraphs 7 - 9).

63. But, in two respects, the GFT secretaries are distinctive from other hospital employees in similar or related administrative, clerical, office or secretarial work. Those respects are the following: firstly, the GFTs' job security is significantly more precarious because it depends upon the continued association of the physician concerned and the hospital (other employees' jobs are not so tenuously dependent upon the continuing presence of particular members of management); secondly, the GFT Secretaries' Association has been recognized as a representative body of GFTs, and it has served, and been recognized by management to serve, the function of being a collective conduit for the expression of the GFTs' interests.

64. However, there are several factors that urge the opposite conclusion. Among them are the following: GFT secretaries are one classification of secretaries within the administrative and clerical grouping; the application endeavours to convert a job classification into a bargaining unit; persons in equivalent positions to GFT secretaries are employed at hospitals throughout Ontario and nowhere are they treated as a distinct bargaining unit separate from other clerical or administrative employees; there is no particular uniqueness in the work of the GFT secretaries - their core duties are neither substantially nor significantly different from the duties of other secretarial employees of the hospital; the physical dispersion of the GFT secretaries across the hospital is not particular to them, other secretaries and clerical employees are similarly scattered across the hospital, working in relatively isolated work units; not only GFT secretaries are "employed" by GFT physicians, other employees are in the same predicament and, were GFT secretaries to be treated as a distinct bargaining unit then those other "employees" of GFT physicians might be without a suitable organizational context; if the applicant's

proposed bargaining unit were to be certified, the Board would be granting certification by classification, which has not been its practice, with potentially serious consequent labour relations problems; the current practice of GFT secretaries being transferred to other secretarial positions in the hospital could cease, just as could the temporary replacement of GFT secretaries by other secretaries, hence the mobility of GFT and other secretaries may decrease as a result of any declaration of GFT secretaries as a separate bargaining unit.

65. We recognize that the right of free association of the GFT secretaries is meaningful largely to the extent that they are able to enter into a collective bargaining relationship with their employer. We recognize too that to deny this application will have the effect of thwarting an opportunity to engage in collective bargaining and to have a significant say over the quality of their working lives. But the entitlement to bargain collectively should not be conferred in circumstances when the proposed bargaining unit is not viable and it would be likely to create serious labour relations problems. Bearing in mind that the Board has in many cases “underlined its reluctance to define bargaining units on the basis of employee classifications or employer departments because of the high potential for fragmentation in bargaining which that creates” (*Sifton Properties Limited*, [1993] OLRB Rep. Oct. 1010, at 1015 ¶129), we now address those considerations.

66. The key question we ask ourselves is whether the GFTs should be separated from the general body of clerical and administrative staff for the purpose of collective bargaining; in other words, do they constitute an appropriate bargaining unit? To recognize them as a unit will have the effect of fragmenting the body of administrative, secretarial and office employees at the hospital. That consideration may not, on its own, be decisive and we look to determine whether a separate GFTs’ unit would be likely to create labour relations problems and whether it would constitute a viable, i.e. effective, unit for the purposes of collective bargaining.

67. Mr. Faguy, the hospital’s witness, described what he saw to be the potential labour relations problems that would arise if the application were to be granted. He saw the problems as falling into three areas: problems the GFT secretaries would face; problems which other secretarial and clerical employees would face; and problems the employer would face. We describe each in turn.

Problems the GFT secretaries would face

68. The GFT secretaries would no longer be treated the same as other secretarial and clerical employees. Currently they have the same terms and conditions of employment and their wage rates are set by reference to the broad job categories of all secretarial, administrative and clerical employees. Mr. Faguy suggested that if the GFT secretaries were in a separate bargaining unit, their conditions of employment would not necessarily remain at least as favourable as they are now.

69. GFT secretaries need mobility in their employment. They need to be able to obtain work in the hospital as a whole if their GFT physician should suddenly end his/her relationship with the hospital and leave. GFT secretaries are more vulnerable than other employees in this regard. Others have greater job security in that they tend to remain in their jobs notwithstanding changes in management. That is not so as regards the GFT secretaries. They are more likely to lose their jobs if a GFT physician leaves. Either s/he will not be replaced and his/her position will be frozen or the in-coming physician may bring his/her own secretary with him/her and the GFT secretary would, in both events, be made redundant. GFT secretaries need mobility to be able to apply for jobs which are posted in other sections of the hospital. If the GFTs are in a separate bargaining unit then they may not have any preference, or even entitlement, to apply for work outside of their bargaining unit. That would severely limit their mobility and reduce their job security. The establishment of a separate bargaining unit would create barriers between the GFTs and other secretaries, which would limit the GFTs’ opportunities, e.g. in taking on relief work for non-GFT secretaries.

70. There is a great deal of interaction between the GFT secretaries and other employees, particularly clerical and secretarial employees. The work relationships between the GFTs and other clerical and administrative employees may no longer be as congenial and harmonious as they now are if the GFTs were declared to be a separate bargaining unit.

Problems the non-GFT secretaries and other clerical staff would face

71. The problems that secretarial and administrative employees would face if the GFTs were certified as a separate bargaining unit are really the inverse of the problems described above. There could be a problem of unequal treatment. Up to now all secretarial, administrative and clerical employees have the same terms and conditions of employment, and their wage rates are on a comparable and compatible scale. Mr. Faguy suggested that if the GFT secretaries' terms and conditions of employment were to change significantly in relation to other secretarial or clerical employees there could be feelings of resentment and envy.

72. In Mr. Faguy's view, if other categories of secretarial or administrative employees were organized by a union other than the applicant, then a rivalry could be fomented among the different categories of employees, particularly as between the GFTs and other clerical employees.

73. The mobility of non-GFT secretaries to move into GFT positions would be restricted. At present secretaries who work other than for GFT physicians are able to apply for GFT secretarial positions and become GFTs. Recognition of the applicant's proposed bargaining unit would obstruct that opportunity.

74. Employees, other than GFT secretaries, who work for GFT physicians, would be out on a limb. They would not be part of the GFT secretaries' bargaining unit, yet they would be subject to all of the exigencies and particularities that apply to the GFT secretaries. The harmonious working relationships between GFT secretaries and other GFT staff would be undermined. In parenthesis, it should be noted that Mr. Hayes, for the union, had an answer to this potential problem. He saw no difficulty in having the GFT secretaries' bargaining unit extended to include all GFT staff, whether they were secretaries or whether they performed other clerical or technical work for GFT physicians.

Problems the employer would face

75. The employer would potentially face a multiplicity of groups within the clerical/administrative category of employees. The employer would have greater difficulty than exists at present to ensure equal treatment among employees. In fact the possibilities of unequal treatment would substantially increase if the GFT secretaries were segregated from the other administrative, secretarial and clerical employees in their own exclusive bargaining unit.

76. The hospital could face the risk of whipsaw bargaining - a concession made to one bargaining unit of secretaries, say the GFTs, could inspire a rival union representing other secretaries and administrative employees to make increased demands to prove its worth to its members and to those in the competing union. Whipsaw bargaining is ever a potential problem where a multiplicity of bargaining units exists in one employer, but that problem is exacerbated when the competing unions are concerned to organize and represent the same category of employees (e.g. secretarial, clerical and administrative employees) and that category is divided between rival unions on the basis of different classifications.

77. Although, under the *Hospital Labour Disputes Arbitration Act*, interest disputes between unions and employers in the hospital sector are referred to binding interest arbitration if the parties cannot themselves settle the disputes, Mr. Faguy foresaw labour relations problems arising from the

splitting of a particular job category (secretaries) along classification lines. He suggested that the hospital sector has coped with certain established bargaining units, e.g. nurses; paramedical staff; administrative, clerical and secretarial employees; technical staff; and service employees. In some hospitals service and technical staff fall within the same bargaining unit, and there are other combinations in other hospitals, e.g. clerical employees are sometimes combined with technical staff and/or with service staff; or technical staff are combined with paramedical employees. (In this regard, see the overview provided by the Board in *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266 at 267 *et seq.*). But what has not been recognized anywhere in Ontario is a bargaining unit representing merely a classification of employees who would normally fall within a larger bargaining unit, in which their classification would be one among many of the same broad job type. To recognize the GFT secretaries as an appropriate bargaining unit would be to introduce direct competition between different classifications within the same customary or usual bargaining unit of clerical employees.

78. The employer's ability to accommodate workplace change, particularly to address the problems arising from the merger of the hospital with Victoria Hospital, would be limited by the carving out of the GFT secretaries classification from the other secretarial and clerical classifications within the new administrative structure.

79. The hospital is undergoing a process of major technological change in respect of its information storage and distribution, and there ought to be as little impediment as possible to the integration of its information systems. The existence of a separate bargaining unit for GFT secretaries may notionally affect that process. The hospital's flexibility and efficiency might arguably be affected by the existence of a specialized bargaining unit of GFT secretaries.

80. Mr. Faguy suggested that the logic of collective bargaining is that employees in similar circumstances should be treated alike. Thus, for example, all secretaries in the hospital should be treated alike. The existence of a separate bargaining unit of GFT secretaries might have a whipsawing effect upon collective bargaining because secretaries of different classification, within the same broad job description, might be part of different bargaining units and subject to different collective agreements. A narrow definition of the bargaining unit, as proposed by the applicant, will have the effect of creating a number of different bargaining units among the various classifications of employees within the broad category of administrative and secretarial employees. There is also the prospect of employees performing virtually the same work under different terms and conditions of employment. Thus, employees who ought to have a common framework of employment conditions could be treated differently if the applicant's proposed bargaining unit were accepted.

81. The creation of a GFT secretaries bargaining unit is likely to generate jurisdictional disputes over what work belongs to whom. For example, whose work would it be to transcribe physician's notes, or to book appointments. In reality both GFT secretaries and other administrative and clerical employees perform that work. Recognition of a separate bargaining unit for GFT secretaries opens the door to disputes over work assignment - a matter which is not currently a problem in the administrative/secretarial sector.

82. Mr. Faguy wondered what might occur if, as a result of collective bargaining between the applicant, representing a bargaining unit of GFT secretaries, and the hospital, the GFT physicians were to decide that they could no longer afford to contribute towards the costs of the GFT secretaries in the amounts agreed upon and that they would prefer to use other hospital administrative and secretarial staff. That type of problem might arise if the GFT secretaries were separated from the general body of secretarial, administrative and clerical employees.

83. We note these speculations by Mr. Faguy. A few are perhaps somewhat remote possibilities, but most, in our view, are reasonable concerns of the hospital. Considered overall, we are satisfied that

the splitting off of the GFT secretaries from others in the same broad job category is likely to create labour relations problems for the hospital. Furthermore, we are of the opinion that the GFT secretaries on their own, separated from other secretarial and clerical employees, will not be in a position to pursue a viable and meaningful collective bargaining relationship with the hospital. The Board's comment in *Board of Education for the City of Toronto*, [1970] OLRB Rep. July 430 at paragraph 18 is apposite:

18. The fact finding process is at all times directed toward and governed by the concept of appropriateness and the essence of appropriateness in the context of labour relations is that the unit of employees be able to carry on viable and meaningful collective bargaining relationship with their employer. It is the Board's experience that employees may in some cases subdivide themselves into small groups which may result in an unnecessary fragmentation or atomization of the employees. Thus an employer faced with the possibility of lengthy, protracted and expensive bargaining and the further possibility of jurisdictional disputes among multiple bargaining groups represented by one or more trade unions may find it impossible to carry on a viable and meaningful collective bargaining relationship. The Board therefore is adverse to certifying employee groups where the result is undue fragmentation and in those circumstances the Board will find the unit proposed inappropriate on the basis that a meaningful and viable collective bargaining relationship will not result. See e.g. *Waterloo County Health Unit*, 1969 January OLRB Mthly Rep. 1016.

84. Mr. Hayes, for the union, argued that we must consider whether it would be unreasonable to establish the bargaining unit of GFT secretaries, and only if so satisfied should we decline the application. He suggested that no significant labour relations problems would arise if the hospital were obliged to negotiate with the union acting on behalf of GFT secretaries, much along the lines of what has been its practice in relation to the GFT Secretaries' Association. He argued that mere speculation on the possibility of labour relations harm is insufficient, the evidence must go further and suggest the likelihood of such harm.

85. The determination of possible labour relations problems is largely in the realm of speculation and there is no certain answer, but, from the evidence presented at the hearing, we are satisfied that there is a distinct likelihood of labour relations problems. Furthermore, were we to recognize the union's proposed bargaining unit, a new fragmentation would be created within the hospital sector, another division within an already divided collective bargaining structure. The scope and possibility for jurisdictional disputes, for rivalry and division between employees would increase. The mobility available to employees at present would be curtailed. The common terms and conditions of employment of secretarial and office staff would, in all likelihood, be jeopardized if the GFT secretaries were separated from the others of their job category.

86. In general, the existing structure of collective bargaining in the hospital sector includes the following typical or established units: nursing, paramedical, clerical, technical and service staff. To further sub-divide that structure by splitting the different classifications of secretary, which fall within the clerical staff unit, would be to create an additional and, in our view, unnecessary differentiation. From a public policy perspective, it would not be a desirable development to open a new avenue of fragmentation within the structure of collective bargaining in the hospital sector. As the Board said in *The Hospital for Sick Children*, above, at page 271, paragraph 17:

... what then is the purpose of the concept of the "appropriate bargaining unit"? Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship. ..."

87. The union's counsel referred us to Board decisions in which certified, registered or graduate nursing assistants were found to constitute a viable bargaining unit (*Wingham and District Hospital*, [1993] OLRB Rep. Sept. 914; *Engelhart & District Hospital Inc.*, [1993] OLRB Rep. Sept. 827; *South Muskoka Memorial Hospital*, [1992] OLRB Rep. April 520; *The Mississauga Hospital*, [1991] OLRB

Rep. Dec. 1380). By analogy it was suggested that GFT secretaries were a distinct group in relation to other secretarial and administrative employees in much the same way that RNA's are separate from registered nurses. While there is substance in the analogy, we are not persuaded that the exceptional reasons, which favoured the granting of bargaining rights to RNA's in those cases, apply here. Those cases represent "a departure from the Board's usual rejection of department and classification based bargaining units". (*Wingham & District Hospital*, above, 75). They addressed an historically anomalous situation. That condition does not apply in this case. There is no compelling historical or structural reason to carve off a classification within the clerical-secretarial category of employees into a separate bargaining unit. The historical anomaly of the RNA's situation in relation to RN's, paramedical employees and service units (described in *Englehart & District Hospital Inc.*, above, ¶158) is not transferable, nor applicable, to the situation of the GFT secretaries.

88. *Ottawa Board of Education*, [1994] OLRB Rep. Dec. 1690, has significant similarities with the facts and issues in this case. That case concerned an endeavour by a union to obtain certification in respect of a particular classification of employees. The Board found that a particular classification of teachers was not an appropriate bargaining unit. The reasoning in that case is pertinent to our consideration of the facts and issues in this case.

89. When deciding that the creation of a particular bargaining unit is likely to cause serious labour relations problems, we should consider whether that conclusion is off-set by the effect of the denial of an endeavour by a group of employees to enter into a collective bargaining relationship with their employer. In this case we are satisfied that a unit restricted to GFT secretaries will not be a viable unit for collective bargaining and it would, we believe, create serious labour relations problems within the hospital, for the GFT secretaries, for other secretaries, for administrative employees employed by GFT physicians and for the hospital's management. We think that those considerations outweigh our concern that the opportunity to bargain collectively not be denied to employees. The primary objective of our discretion is to determine whether the applicant's proposed bargaining unit is likely to be a viable, stable and effective collective bargaining structure. We are not satisfied that it will be. The GFT secretaries, although the largest classification of secretaries, is a minority of the general body of secretarial, office and clerical employees. In the context of the merger between the hospital and Victoria Hospital, the GFT secretaries would constitute an even tinier and more vulnerable grouping, even less able to influence the employer in collective bargaining than if the merger had not occurred. The GFT secretaries on their own lack sufficient foundation for a stable and effective collective bargaining relationship of reciprocal give and take. This consideration is the reason the Board has stated that "the broader, more comprehensive unit is 'presumptively appropriate' where the union applies for that unit" (*Ken Bodnar Enterprises Inc.*, [1994] OLRB Rep. June 688, at 698 ¶130). The GFT secretaries do not, in our view, constitute a grouping which can viably bargain with the employer. They lack the potential persuasive impact which would exist were their bargaining unit to include all secretarial and clerical employees, as the hospital has proposed. The approach we adopt is described in *The Niagara Parks Commission*, [1995] OLRB Rep. Mar. 363 at 370 ¶44:

44. Fragmentation is undoubtedly a critical factor in the generation of serious labour relations problems. It may trigger significant disruption of the employer's management of the enterprise, and it may result in non-viable collective bargaining relationships. The Board has often reviewed the problems that may arise where there is a "proliferation of small units" or a "patchwork quilt" of bargaining units. Fragmentation can limit employee mobility through development of seniority enclaves, and can precipitate unnecessary work stoppages or organizational problems when one fragment strikes, and can spawn jurisdictional disputes or inter-employee rivalries, and can discourage equitable treatment of employees doing similar jobs (see further review of potential problems in *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250 at para 28; and *Hospital for Sick Children*, *supra*, at paras. 18-20; and *Salvation Army*, *supra*, at para. 21). Facing concerns of that sort, it is not surprising that the Board admits to the "instinctive attractiveness of broader-based units" (as described at paras. 12-13 of *National Trust*, *supra*).

90. A further consideration as regards the right of association of employees, is whether particular difficulties exist in relation to the organizing of employees. If there were such difficulties, that might influence the Board's deliberation on the issue. There was no evidence in this case of any special or undue difficulties in organizing the wider bargaining unit contended for by the hospital.

91. Having regard to all of the above considerations, we find that the union's bargaining unit is not appropriate for the purposes of collective bargaining. An appropriate bargaining unit is that proposed by the hospital, the full complement of clerical and secretarial employees - that is a viable bargaining unit which can properly engage in collective bargaining with the employer.

92. The application is dismissed.

DECISION OF BOARD MEMBER K. S. BRENNAN: July 11, 1996

1. The majority erred when it held that the proposed bargaining unit was not appropriate because a bargaining unit of GFT secretaries would cause serious labour relations problems.

2. The hospital recognized and had a working history tantamount to collective bargaining with the GFT secretaries for fifteen years. Now that the GFT secretaries have decided to exercise their rights to be represented by a trade union of their choice, the majority adopts the employer's position that they do not constitute an appropriate bargaining unit. To now allow the employer to hide behind the standard of appropriate bargaining unit is unfair and a denial of natural justice. It is common knowledge that employers support employee associations to give a false sense of security or participation and to impede unionization. The decision of the majority is not supported by relevant legal principals and should not be allowed.

3. The test under section 6(1) of the *Labour Relations Act* prior to its 1995 amendment is whether the proposed bargaining unit is viable and will not cause serious labour relations problems. The relevant factors that the Board considers include: whether the employees have a community of interest having regard to the work performed, the right of the employees to a measure of self-determination, the practice or history of collective bargaining, and undue fragmentation. (*The Hospital for Sick Children, supra; Burns International Security Services Limited*, [1994] OLRB Rep. Apr. 347). An application of each of these factors to the present case will demonstrate that the majority was not constrained by legal principles to reach its conclusion. The majority identified but failed to apply the traditional test of the Board.

Community of Interest

4. The majority extensively reviewed the nature of the work performed by GFT secretaries including their qualifications, duties, work environment and terms and conditions of employment. The majority acknowledges that "there is little doubt" that the GFT secretaries have a community of interest. In the terms of reference of the "Mutual Interest Group" the hospital recognized its unique relationship to the GFT association:

University Hospital acknowledges the *unique relationship* which exists between the hospital as an employer and the GFT physician secretary as an individual employee. A Mutual Interest group will be formed in order to ensure full communication, understanding and to willingly co-operate with each other in the fullest sense.

The purpose of this group is to provide a structured method for the discussion of issues and the dissemination of information related to University Hospital and its *unique relationship* with GFT secretaries.

(emphasis added)

The majority continues to argue that secretaries, clerical and administrative employees share a stronger community of interest than GFT secretaries in isolation. It is a well established principle that the test for the Board is not whether the proposed bargaining unit is the most appropriate unit. The test is whether the proposed bargaining unit is an appropriate unit. The Board reasoned:

A trade union need not seek to represent the *most* comprehensive or *most appropriate* bargaining unit, and as the applicant or moving party, the union has a degree of flexibility in deciding what unit to organize. As long as the unit it seeks does not generate serious labour relations difficulties for the employer, it will be granted the unit it applies for. (*Burns International*, *supra* at 351-2)

The majority recognizes this test but then, in paragraph 86, the majority outlines its view of a more appropriate bargaining unit. According to the majority, the real community of interest lies with the broader grouping of secretarial and office employees. This is not a case, involving multiple certification applications, where the Board has greater latitude to select the most appropriate bargaining unit. (*The Mississauga Hospital*, [1991] OLRB Rep. Dec. 1380 at 1397)

The History of Collective Bargaining

5. The majority, in paragraph 85, identifies several established bargaining units in the hospital sector including: nursing, paramedical, clerical, technical and service staff. The majority failed to give adequate weight to working history between the hospital and association when it dismissed a classification of GFT secretaries. The parties had a history dealing with traditional collective bargaining issues for a period that extended for over a decade. In 1980 the GFT Secretaries' Association was formed and was officially recognized by the hospital administration. I do not need to re-list the numerous meetings that dealt with issues concerning terms and conditions of employment. I cite one meeting as an example:

A Mutual Interest Group meeting took place on May 7, 1994. Items discussed were: Summer Vacation Consolidation, Operation Plan/Budget, Policies and Procedures Manual, Public Relations/Communications changes, Physician Representative, Job Description/Title, L.I.C.O. Salary Adjustments.

The hospital initiated an SOS Association in an attempt to redirect issues from the GFT Mutual Interest Group to an association of administrative, office and secretarial staff. GFT secretaries supported the SOS Association, but never surrendered their own identity. Up until the certification date the GFT association continued to be active and its meetings were attended by Dr. Stuart. The hospital's characterization of the GFT association as nothing more than a vehicle for the exchange of information is not supported by the evidence.

6. The Board has traditionally given weight to the historical relationship between the parties. In *Mississauga Hospital*, the employer had recognized and had dealt with the registered and graduate nursing assistants in a less formalized manner but for purposes very similar to collective bargaining. In *Wingham and District Hospital* there had been a committee composed of RNA's employed by the hospital for thirty years. In both cases, the Board held that a unit comprised of registered or graduate nursing assistants constituted an appropriate bargaining unit. Similar to the Board's finding in *Mississauga Hospital* and *Wingham District Hospital* I would have found that the working history between the hospital and GFT secretaries was indicative of a viable bargaining unit.

Right to self-determination

7. The majority claims, in paragraph 89, to have balanced the opportunity of GFT secretaries to enter into collective bargaining with their employer. The Board has traditionally been reluctant to exercise its authority, to determine an appropriate bargaining unit, to impede the rights of employees to self-organization. The Board has reasoned that:

Indeed, as the *Mississauga Hospital* case itself pointed out, access to the rights set out in section 3 has long been an important consideration of the Board in addressing itself to the question of an appropriate bargaining unit, as noted for example, in the passage cited from the 1970 *Board of Education for the City of Toronto* case, at page 21 of *Mississauga Hospital*:

19. In finding appropriate bargaining units the Board must also be cautious that its determination as to what is appropriate will not impede the right of self-organization guaranteed in section 3 of the *Labour Relations Act*. The National Labour Relations Board in the United States has recognized in certain cases that its determination of appropriate bargaining units has 'operated to impede the exercise of employees ... of their rights of self-organization ...' (*South Muskoka Memorial Hospital*, [1992] OLRB Rep. Apr. 520 at 529).

The risk that the determination of an appropriate bargaining unit may impede the right of employees to organize is particularly heightened in this case where the certification application turns on the Board's determination. In addition past attempts to organize the broader unit advocated by the majority have been unsuccessful.

8. Although the majority, in paragraph 89, recognizes that the GFT secretaries will be denied an opportunity to bargain collectively, the majority concluded that concerns over undue fragmentation were determinative of the issue. I turn to those remaining considerations.

Undue Fragmentation

9. The majority cites several concerns over potential fragmentation including: bargaining unit strength, restricted job mobility, jurisdictional disputes and administrative inconvenience for the employer. Before turning to each of these considerations I note that the employer's evidence was based upon one witness, who in two years with the hospital, could not give one concrete example where labour relations problems arose with the GFT group. The labour relations problems cited by Mr. Faguy were entirely speculative. There is no need to speculate in this case. In most instances the Board must anticipate labour relations problems, but in this case the applicant and the responding party submitted evidence that the hospital and the association had a fifteen year working history without any labour relations problems.

10. The majority's first concern is that GFT secretaries will not have adequate bargaining unit strength. The evidence established that the GFT association was able to exact concessions from the hospital and improve terms and conditions of employment for its members. In addition the concern over bargaining strength is mitigated by the fact that in the Hospital sector industrial disputes are resolved through binding arbitration under the *Hospital Labour Disputes Arbitration Act*. The case cited by the majority, *Ken Bodnar Enterprises Inc.*, [1994] OLRB Rep. June 688, for the proposition that broader based units are presumptively appropriate is not on point. In that case, the union had applied for a broader based unit. The Board reasoned that in light on statutory amendments under *Bill 40* the broader based unit was presumptively appropriate unless overwhelming labour relations difficulties would result. But the Board in *Ken Bodnar Enterprises Inc.* explicitly restricted its analysis to cases where the trade union applies for the broader unit.

11. An additional concern raised by the majority is that the mobility of GFT secretaries would be substantially curtailed if they were certified. This conclusion does not take adequate consideration of the fact that the extent of career transfers over the years has been *de minimus*.

12. The majority suggests, in paragraph 77, that a new administrative structure would have to be created. But the hospital already deals with GFT secretaries on a unique basis. GFT physicians have a significant role over hiring, the exercise of discipline and starting salary. The second argument raised by the majority, that the certification of GFT secretaries would impede the introduction of a new

information storage system, is specious at best. The Board has consistently held that the projected increase in bargaining power from certification does not constitute a labour relations difficulty.

13. Problems listed by the majority regarding jurisdictional disputes were again completely speculative. The applicant's proposal that the bargaining unit be extended to include all GFT staff was sufficient to meet this concern.

14. I note that each of the arguments raised by the employer with regard to labour relations problems were raised in the cases of *Englehart & District Hospital Inc.*, [1993] OLRB Rep. Sept. 827 and *The Mississauga Hospital*, *supra*. In both cases, the Board held that the proposed bargaining unit consisting of registered or graduate nurses was appropriate.

15. In conclusion the community of interest among GFT secretaries, the fifteen year history of consultation between the parties and the choice of employees with regards to self-organization support the finding that the proposed bargaining is viable. With regards to potential labour relations problems I adopt the reasoning of the Board in *Fort William Golf & Country Club Limited*, [1995] OLRB Rep. Aug. 1070, where the Board held that "There was no persuasive evidence of probable labour relations problems arising from certification of the bargaining unit sought by the applicant ... Rather the evidence, although tangential, inclined towards the lack of any likelihood of labour relations difficulties being caused by the recognition of the ground staff as a distinct bargaining unit." Similarly in this case the employer's concerns over labour relations problems are unsubstantiated and speculative. In fact in this case the evidence of the applicant and confirmed by the responding party is even stronger than in *Fort William Golf & Country Club Limited* because we have a fifteen year history to consider.

16. I would have held the proposed bargaining unit is an appropriate bargaining unit within the meaning of section 6(1) of the former Act.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JUNE 1996

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3579-94-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Teamsters Local Union 879 (Hamilton) Holdings (Respondent)

Unit: "all employees of the Teamsters Local 879 (Hamilton) Holdings in the City of Hamilton regularly scheduled for not more than 24 hours per week save and except office staff, the Building Manager and persons above this rank" (6 employees in unit) (*Having regard to the agreement of the parties*)

1822-95-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. 978053 Ontario Inc. c.o.b. as Central Communications (Respondent)

Unit: "all employees of 978053 Ontario Inc., c.o.b. as Central Communications, in the Regional Municipality of Niagara, save and except supervisors and persons above the rank of supervisor" (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Bargaining Agents Certified Subsequent to Vote

3611-95-R: Canadian Union of Public Employees (Applicant) v. 760496 Ontario Limited c.o.b. Supples Landing Residence (Respondent)

Unit: "all employees of 760496 Ontario Limited c.o.b. as Supples Landing Residence in the City of Pembroke, save and except the Director of Nursing (D.O.N.)/Director of Care (D.O.C.), persons above the rank of Director of Nursing/Director of Care, administrative assistant and registered and graduate nurses employed in a nursing capacity" (20 employees in unit)

Number of names of persons on revised voters' list	39
Number of persons listed as in dispute	0
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	1

0043-96-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Hurley Corporation (Respondent)

Unit: "all employees of Hurley Corporation at the Erin Mills Town Centre, 5100 Erin Mills Parkway in the City of Mississauga, save and except supervisors, persons above the rank of supervisor and persons employed for not more than 24 hours per week" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

0159-96-R: London and District Service Workers' Union, Local 220 S.E.I.U., O.F.L., A.F.L., C.I.O., C.L.C. (Applicant) v. Versa Services Ltd. (Respondent) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 647") (Intervener) (*Having regard to the agreement of the parties*)

Unit: "all employees of Versa Services Ltd. employed in the company's cafeteria food service operation at King's College, 266 Epworth Avenue, London, save and except supervisors and persons above the rank of supervisor, chef, office staff, clerical staff and employees in bargaining units for whom any trade union held bargaining rights as of April 12, 1996" (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	15
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0166-96-R: Union of Needletrades, Industrial and Textile Employees (Applicant) v. Cornwall Area Substance Abuse Treatment Centre o/a Place Valois Place (Respondent)

Unit: "all employees of Cornwall Area Substance Abuse Treatment Centre o/a Place Valois Place in the City of Cornwall, save and except senior counsellor and persons above the rank of senior counsellor" (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons listed as in dispute	0
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

0172-96-R: Niagara Health Care and Service Workers Union, Local 302 (CLAC) (Applicant) v. Chippawa Place Inc. c.o.b. as Chippawa Retirement and Care Home (Respondent)

Unit: "all employees of Chippawa Place Inc. c.o.b. as Chippawa Retirement and Care Home in the City of Niagara Falls, save and except supervisors, persons above the rank of supervisor, administrative assistant and office staff" (25 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	1

0178-96-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local 463 (Applicant) v. W. A. Stephenson Construction Managers Inc. (Respondent) v. Innisfil Mechanical Services Ltd. (Intervener)

Unit: “all plumbers and plumbers’ apprentices in the employ of W. A. Stephenson Construction Managers Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers’ apprentices in the employ of W. A. Stephenson Construction Managers Inc. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (0 employees in unit)

Number of names of persons on revised voters’ list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

0221-96-R: Service Employees’ Union, Local 210 (Applicant) v. Society of St. Vincent De Paul Windsor, Essex General Council (Respondent)

Unit: “all employees of the Society of St. Vincent De Paul Windsor, Essex General Council in the County of Essex, save and except Supervisors and persons above the rank of Supervisor” (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	38
Number of persons who cast ballots	37
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	32
Number of segregated ballots cast by persons whose names appear on voter’s list	2
Number of segregated ballots cast by persons whose names do not appear on voters’ list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	5

0294-96-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Quinte Learning Centre Ltd. (Respondent)

Unit: “all employees of the Quinte Learning Centre Ltd. in the City of Toronto, save and except managers and persons above the rank of manager” (27 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	29
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	23
Number of segregated ballots cast by persons whose names appear on voter’s list	0
Number of segregated ballots cast by persons whose names do not appear on voters’ list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	3

0298-96-R: Canadian Union of Public Employees (Applicant) v. Thorneloe University (Respondent)

Unit: “all part-time academic staff of Thorneloe University of Laurentian University save and except Senior Administrators, Instructors in the School of Theology and persons covered by the collective agreement between the Laurentian University Faculty Association and Thorneloe University” (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	3

0397-96-R: Service Employees International Union, Local 204 Affiliated With The S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Citipark Inc. (Respondent)

Unit: "all employees of Citipark Inc. in Metropolitan Toronto employed for not more than 24 hours per week and students employed during school vacation, save and except supervisors, maintenance foremen and auditors, persons above the rank of supervisor, maintenance foremen and auditors, office and clerical staff, and persons in bargaining units for which any trade union held bargaining rights as of May 3, 1996," (60 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	82
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	0

0407-96-R: United Steelworkers of America (Applicant) v. BOC Canada Limited (Respondent)

Unit: "all employees of BOC Canada Limited employed as route salespersons/Cylinder delivery drivers with five ton trucks or less working at or out of its branch retail stores in the Municipality of Metropolitan Toronto, save and except branch co-ordinator, persons above the rank of branch co-ordinator, office, clerical and inside sales staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons listed as in dispute	0
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

0465-96-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. The Howard Johnson Plaza Hotel, North York (Respondent) v. Hotel Employees Restaurant Employees Union, Local 75 (Intervener)

Unit: "all employees of The Howard Johnson Plaza Hotel, North York, located at 2737 Keele Street, Downsview, Ontario, save and except Chefs, Sous Chefs, Assistant Housekeepers, Bar Managers and Supervisors, office and sales staff (including reservation staff, Night Auditor and front desk staff), accounting staff, Secretaries and security staff" (140 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	114
Number of persons who cast ballots	115
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	115
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1

Number of ballots marked in favour of applicant	69
Number of ballots marked in favour of intervener	45
Number of ballots segregated and not counted	0

0468-96-R: Local 636 of the International Brotherhood of Electrical Workers (Applicant) v. Canadian Inkjet Systems Ltd. (Respondent)

Unit: "all employees of Canadian Inkjet Systems Ltd. at and out of the Town of Oakville, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1

0470-96-R: International Brotherhood of Painters and Allied Trades, Local Union 1487 (Applicant) v. Malor Auto Glass Ltd. (Respondent)

Unit: "all employees of Malor Auto Glass Ltd. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and clerical and office staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons listed as in dispute	0
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0534-96-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Seaforth Creamery Inc. (Respondent)

Unit: "all employees of Seaforth Creamery Inc. in the Town of Seaforth, Ontario, save and except supervisors and those above the rank of supervisor, office and clerical, sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed in a co-operative work program" (73 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	69
Number of persons who cast ballots	66
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	38
Number of ballots marked against applicant	27

0551-96-R: International Union of Operating Engineers, Local 793 (Applicant) v. The Municipality of Metropolitan Toronto (Respondent) v. Metropolitan Toronto Civic Employees Union, Local 43 (Intervener)

Unit: "all employees of The Municipality of Metropolitan Toronto at the Keele Valley Landfill and Brock West Landfill sites engaged in the operation of earth scrapers, landfill compacters, soil compacters, and bulldozers of the D8 Caterpillar bulldozer size or larger, save and except supervisors, persons above the rank of supervisor,

office, clerical and technical staff, and employees in a bargaining unit for which any trade union held bargaining rights as of May 17, 1996" (22 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

0601-96-R: Labourers' International Union of North America, Local 183 (Applicant) v. Everbrick Ltd. (Respondent)

Unit: "all journeymen and apprentice bricklayers and construction labourers in the employ of Everbrick Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2

0603-96-R: Association des enseignantes et des enseignants franco-ontariens (Applicant) v. Conseil des écoles séparées catholiques du district de Timmins (Respondent)

Unit: "les enseignantes et les enseignants suppléants qualifiés à l'emploi du Conseil des écoles séparées catholiques du district de Timmins dans ses écoles élémentaires et secondaires où le français est la langue d'enseignement en conformité avec la partie XII de la Loi sur l'éducation" (42 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	49
Number of persons listed as in dispute	0
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0613-96-R: International Brotherhood of Electrical Workers, Construction Council of Ontario (Applicant) v. TG Automation Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of TG Automation Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of TG Automation Inc. in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former

County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non- working foremen and persons above the rank of non-working foreman” (9 employees in unit)

Number of names of persons on revised voters’ list	10
Number of persons listed as in dispute	0
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	9
Number of segregated ballots cast by persons whose names appear on voter’s list	0
Number of segregated ballots cast by persons whose names do not appear on voters’ list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0618-96-R: International Union of Operating Engineers, Local 793 (Applicant) v. Mev Group Inc. (Respondent)

Unit: “all employees of Mev Group Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of Mev Group Inc. in all other sectors in the District of Kenora including the Patricia portion engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

Number of names of persons on revised voters’ list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	3
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

0619-96-R: United Steelworkers of America (Applicant) v. Newgen Restaurant Services Inc. c.o.b. Tucker’s Marketplace (Respondent)

Unit: “all employees of Newgen Restaurant Services Inc. c.o.b. Tucker’s Marketplace at 15 Carlson Court in the Municipality of Metropolitan Toronto, save and except Managers and persons above the rank of Manager” (75 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	74
Number of persons who cast ballots	62
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	60
Number of segregated ballots cast by persons whose names do not appear on voters’ list	2
Number of ballots marked in favour of applicant	42
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	2

0674-96-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Forest City Uniform Services Ltd. (Respondent) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Intervener)

Unit: “all employees of Forest City Uniform Services Ltd. in the City of London, save and except foremen, persons above the rank of foreman, office and sales staff, drivers and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (83 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	83
Number of persons listed as in dispute	0
Number of persons who cast ballots	71

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	71
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	57
Number of ballots marked in favour of intervener	12
Number of ballots segregated and not counted	0

0703-96-R: Labourers' International Union of North America, Local 183 (Applicant) v. Sunstar Masonry (Respondent)

Unit: "all journeymen and apprentice bricklayers and construction labourers in the employ of Sunstar Masonry in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

0704-96-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Loeb Booth Street (Respondent)

Unit: "all employees of Loeb Booth Street at 314 Booth Street in the City of Ottawa, save and except managers, persons above the rank of manager, and bookkeeper" (26 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	3

0705-96-R: Association of Allied Health Professionals: Ontario (Applicant) v. St. Joseph's Health Centre (Respondent)

Unit: "all paramedical employees of St. Joseph's Health Centre in Peterborough, save and except supervisors, persons above the rank of supervisor, and employees in bargaining units for which any trade union held bargaining rights as of the application date, June 5, 1996" (45 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	30
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	30
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	5

0719-96-R: Ontario Public Service Employees Union (Applicant) v. Book Ambulance Service Ltd. (Respondent)

Unit: “all employees of Book Ambulance Service Ltd., in the Township of West Lincoln, Regional Municipality of Niagara, save and except manager, persons above the rank of manager, and employees in bargaining units for which any trade union held bargaining rights as of the application date, June 6, 1996” (9 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters’ list	9
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	8
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	2

0739-96-R: Communications, Energy & Paperworkers Union of Canada (CEP) (Applicant) v. Consumers Gas Company Ltd. (Respondent)

Unit: “all employees of Consumers Gas Company Ltd., in the City of Vaughan, save and except managers, persons above the rank of manager, office and clerical staff, and employees in bargaining units for which any trade union held bargaining rights as of the application date, June 10, 1996,” (3 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters’ list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	3
Number of segregated ballots cast by persons whose names appear on voter’s list	0
Number of segregated ballots cast by persons whose names do not appear on voters’ list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	1

Applications for Certification Dismissed Without Vote

2821-94-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Mike Piper c.o.b. as Advance Pipeline & Mechanical Contractors, 882870 Ontario Inc. operating as Advance Pipeline & Mechanical Contractors (Respondent) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 195 (Intervener)

0004-95-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Bridgewood Plumbing Limited (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, International Brotherhood of Electrical Workers, Local 353, Ontario Pipe Trades Council, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 853, Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, The Provincial Building & Construction Trades Council of Ontario, Building and Construction Trades Department AFL-CIO Canadian Office, Toronto - Central Ontario Building And Construction Trades Council (Intervenors)

0031-95-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Nova Plumbing & Heating (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Building and Construction Trades Department AFL-CIO Canadian Office, International Brotherhood of Electrical Workers, Local Union 353, The Provincial Building & Construction Trades Council of Ontario, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Ontario Pipe Trades Council, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 853, Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Ontario Sheet Metal Workers’ & Roofers’ Conference on behalf of its affiliate Sheet Metal Workers’ International Association, Local 285 (Intervenors)

0058-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Eastgate Plumbing Inc. (Respondent) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Ontario Pipe Trades Council, Building and Construction Trades Department AFL-CIO Canadian Office, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, United Association of Journeymen and Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 853, International Brotherhood of Electrical Workers, Local Union 353, International Association of Bridge, Structural and Ornamental Iron Workers and Iron Workers District Council of Ontario, The Provincial Building & Construction Trades Council of Ontario, Toronto-Central Ontario Building and Construction Trades Council, Ontario Sheet Metal Workers' & Roofers' Conference on behalf of its affiliate Sheet Metal Workers' International Association, Local 285 (Intervenors)

0157-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. 410385 Ontario Limited c.o.b. as Maple Drywall (Respondent) v. Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America, International Brotherhood of Painters and Allied Trades, Local 1891 and International Brotherhood of Painters and Allied Trades, District Council 46, Building and Construction Trades Department AFL-CIO, Canadian Office, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, International Association of Bridge, Structural and Ornamental Iron Workers and Iron Workers District Council of Ontario (Intervenors)

0272-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Blue Star Drywall and Acoustics Ltd. (Respondent) v. Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Intervener)

0276-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. M-Four Contractors (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 27, United Brotherhood of Carpenters and Joiners of America, Local 675 (Intervenors)

0310-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. City Wide Drywall Systems Ltd. (Respondent) v. Ontario Council of The International Brotherhood of Painters and Allied Trades, Local Union 1891, United Brotherhood of Carpenters and Joiners of America, Local 675 (Intervenors)

0313-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Tri-Star Drywall and Acoustics Systems Inc. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation, Local 675, International Brotherhood of Painters and Allied Trades, Local 1891 (Intervenors)

0348-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Vitullo Bros. Plumbing Co. Ltd. (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Building and Construction Trades Department AFL-CIO Canadian Office, Ontario Pipe Trades Council, The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Toronto - Central Ontario Building and Construction Trades Council, Ontario Sheet Metal Workers' & Roofers' Conference on behalf of its affiliate Sheet Metal Workers' International Association, Local 285 (Intervenors)

0409-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Norstar Mechanical Ltd. (Respondent) v. Ontario Pipe Trades Council, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, Building and Construction Trades Department AFL-CIO Canadian Office, United Association of Journeymen and Apprentices of the Plumbing and

Pipefitting Industry of the United States and Canada, Local Union 853, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Toronto - Central Ontario Building and Construction Trades Council, Ontario Sheet Metal Workers' & Roofers' Conference on behalf of its affiliate Sheet Metal Workers' International Association, Local 285 (Interveners)

0433-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Marel Contractors Ltd. (Respondent) v. Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Intervener)

0434-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Canrose Drywall Co. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation, Local 675 (Intervener)

0437-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Eldom Drywall (Respondent) v. Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Intervener)

0456-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Downsview Plumbing & Heating (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Ontario Pipe Trades Council, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the States and Canada, Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 853, Building and Construction Trades Department AFL-CIO Canadian Office, Ontario Sheet Metal Workers' & Roofers' Conference on behalf of its affiliate Sheet Metal Workers' International Association, Local 285 (Interveners)

0788-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Mamar Contractors (Respondent)

2706-95-R: The Amalgamated Transit Union (Applicant) v. The Miller Group, Miller Paving Limited, Miller Transit Limited (Respondent)

Applications for Certification Dismissed Subsequent to Vote

0431-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Riva Plumbing Ltd. (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Toronto - Central Ontario Building and Construction Trades Council, Building and Construction Trades Department AFL-CIO Canadian Office, Ontario Pipe Trades Council, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 853, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463, Ontario Sheet Metal Workers' & Roofers' Conference on behalf of its affiliate Sheet Metal Workers' International Association, Local 285 (Interveners)

Unit: "all plumbers and plumbers' apprentices in the employ of (the employer) in the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial

and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

2135-95-R: Hospitality, Commercial and Service Employees Union of Canada (Applicant) v. Tara-Lynn Leasing, c.o.b. as Kelly’s Professional Family Hair Care (Respondent) v. Hospitality, Commercial and Service Employees Union, Local 73 chartered by Hotel Employees and Restaurant Employees International Union, and Hotel Employees and Restaurant Employees International Union (Intervener)

Unit: “all employees of Tara-Lynn Leasing c.o.b. as Kelly’s Professional Family Hair Care in all of its locations in the City of Thunder Bay, save and except Managers, Assistant Managers and persons above the rank of Assistant Manager” (10 employees in unit)

Number of names of persons on revised voters’ list	10
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	8
Number of segregated ballots cast by persons whose names appear on voter’s list	1
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	4
Number of ballots segregated and not counted	1

3997-95-R: United Food and Commercial Workers International Union (Applicant) v. Tiveron Farms Limited (Respondent)

Unit: “all employees of Tiveron Farms Limited in the City of Mississauga, save and except supervisors, persons above the rank of supervisor and office and clerical staff” (62 employees in unit)

Number of names of persons on revised voters’ list	70
Number of persons who cast ballots	53
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	50
Number of segregated ballots cast by persons whose names appear on voter’s list	3
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	40
Number of ballots segregated and not counted	3

0281-96-R: United Steelworkers of America (Applicant) v. 935772 Ontario Ltd. c.o.b. as “Royal Taxi” (Respondent)

Unit: “all employees of 935772 Ontario Ltd. c.o.b. as Royal Taxi in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, inspectors, dispatchers, calltakers, maintenance staff, office and clerical staff and multiplate/multi-car owners/leasees” (792 employees in unit)

Number of names of persons on revised voters’ list	460
Number of persons who cast ballots	460
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	193
Number of ballots marked against applicant	247
Number of ballots segregated and not counted	17

0368-96-R: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. Beehler Brothers Electrical Contractors Ltd. (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of Beehler Brothers Electrical Contractors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians’ apprentices in the employ of Beehler Brothers Electrical Contractors Ltd. in all other sectors in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds

and Grenville, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	1

0408-96-R: Teamsters Local Union No. 230 Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Applicant) v. Lafarge Canada Inc. (Respondent)

Unit: "all employees of Lafarge Canada Inc. working in and out of the Township of Elizabethtown, Ontario, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (53 employees in unit)

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	41
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	4

0503-96-R: Hotel, Motel and Restaurant Employees' Union, Local 442 (Applicant) v. 895117 Ontario Limited c.o.b. as Denny's Restaurant (Respondent)

Unit: "all employees of Denny's Restaurant - Buchanan Street in the City of Niagara Falls, Ontario, save and except Managers, persons above the rank of Manager and office and clerical staff" (70 employees in unit)

Number of spoiled ballots	2
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	35

0504-96-R: Hotel, Motel and Restaurant Employees' Union, Local 442 (Applicant) v. Hospitality Motels Limited c.o.b. Denny's Restaurant (Respondent)

Unit: "all employees of Denny's Restaurant - Lundy's Lane, in the City of Niagara Falls, Ontario, save and except Managers, persons above the rank of Manager and office and clerical staff" (52 employees in unit)

Number of spoiled ballots	1
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	3

0505-96-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees, International Union Local 351 (Applicant) v. London Roasters Inc. (c.o.b. as Kenny Rogers Roasters) (Respondent)

Unit: "all employees of Kenny Rogers Roaster Family Restaurant in the City of London at 995 Wellington Road South, save and except Assistant Managers, persons above the rank of Assistant Manager, accounting staff and students employed during the school vacation period" (34 employees in unit)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1

Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	20
Number of ballots segregated and not counted	4

0614-96-R: United Food and Commercial Workers International Union, Local 1000A (Applicant) v. Big V Pharmacies Co. Ltd. (Respondent)

Unit: "all employees of Big V Pharmacies Co. Ltd. at 180 Holiday Inn Drive in the City of Cambridge save and except merchandiser, staff pharmacist, pharmacist, persons above the rank of merchandiser, staff pharmacist and pharmacist." (22 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	12

0641-96-R: IWA - Canada (Applicant) v. Triple A Hardwoods Inc. (Respondent)

Unit: "all employees of Triple A Hardwood Inc. in the village of Thedford, Ontario, save and except production supervisor/Q.C., persons above the rank of production supervisor/Q.C., office and sales staff" (20 employees in unit)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	11

0644-96-R: Industrial and Commercial Workers' Union (Unite) (Applicant) v. Northern Lights Fitness Product Inc. (1091550 Ontario Inc.) (Respondent)

Unit: "all employees of the responding party in the City of Cornwall, save and except supervisors and persons above the rank of supervisor, office and clerical staff, salespersons and students" (27 employees in unit)

Number of names of persons on revised voters' list	34
Number of persons listed as in dispute	0
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	5

0652-96-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Stackpole Ltd. (Respondent)

Unit: "all employees of Stackpole Ltd., in the County of Perth, save and except supervisors, persons above the rank of supervisor, office, clerical, engineering and sales staff" (98 employees in unit)

Number of names of persons on revised voters' list	98
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Number of persons who cast ballots	97
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	96
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	65
Number of ballots segregated and not counted	1

Applications for Certification Withdrawn

4242-95-R: Bakery, Confectionery and Tobacco Workers, International Union, Local 264 (Applicant) v. Shade-O-Matic Ltd. (Respondent)

0386-96-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto (Applicant) v. F. P. Productions Ltd. and 984714 Ontario Limited (Respondents)

0879-96-R: International Union of Operating Engineers, Local 793 (Applicant) v. Lafarge Canada Blasting & Drilling (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

3580-94-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Teamsters Local Union 879 (Hamilton) Holdings (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3199-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. J.B. Mechanical, Jack Bird Plumbing & Heating Ltd., Jack Bird Plumbing & Heating Ltd. c.o.b. as J.B. Mechanical, and 1009789 Ontario Inc. c.o.b. as J.B. Mechanical (Respondents) v. Michael Sexton (Intervener) (*Granted*)

1160-95-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Royal Star Contracting Ltd. and Tristar Drywall and Acoustics Systems Inc. (Respondents) (*Withdrawn*)

1403-95-R: International Union of Bricklayers and Allied Craftsmen, Local 12 and Labourers' International Union of North America, Local 1081 (Applicant) v. Eddie A. Beland c.o.b. as E. Beland Masonry and/or E. Beland Masonry Limited and/or 959640 Ontario Inc. c.o.b. as Beland Masonry and/ or 1114136 Ontario Inc. c.o.b. as Core Tec. Contracting (Respondents) (*Granted*)

2717-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 636 (Applicant) v. Canada Stampings & Dies Ltd., Stamptech Ltd. (Respondents) (*Granted*)

3397-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. Sharon Advertising & Research o/a A.M.F. All Seasons Excavating; Roadway Concrete & Drain Inc. (Respondents) (*Granted*)

3673-95-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Inseal Contracting Inc. and Icyne Inc. (Respondents) (*Endorsed Settlement*)

3873-95-R: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. New Lomar General Contractors Limited, Top Lomar Masonry Limited, 1049086 Ontario Limited c.o.b. as Ericon General Contracting (Respondents) (*Endorsed Settlement*)

4109-95-R: International Union of Bricklayers and Allied Craftsmen Locals 12 and 31 (Applicant) v. Polcon Tile Constructive Interiors Ltd. and Polcon Tile Ltd. (Respondents) (*Endorsed Settlement*)

0022-96-R: United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. SBT Drywall & Acoustics Ltd., 944782 Ontario Limited, SBT Construction Ltd. and SBT Trough Ltd. (Respondents) (*Granted*)

0319-96-R: United Steelworkers of America (Applicant) v. Royal Taxi and 935772 Ontario Ltd. c.o.b. as "Royal Taxi" and those Parties Listed on Schedule "A" (Respondents) (*Withdrawn*)

0383-96-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of The United States and Canada Local 58, Toronto (Applicant) v. F.P. Productions Ltd. and 984714 Ontario Limited (Respondents) (*Granted*)

0686-96-R: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. Cameron-McIndoo Limited, PTI Camp Installations Ltd., Vencap Equities Alberta Limited, PTI Holdings (1983) Ltd., PTI Group Inc. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

3199-94-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. J.B. Mechanical, Jack Bird Plumbing & Heating Ltd., Jack Bird Plumbing & Heating Ltd. c.o.b. as J.B. Mechanical, and 1009789 Ontario Inc. c.o.b. as J.B. Mechanical (Respondents) v. Michael Sexton (Intervener) (*Granted*)

1160-95-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Royal Star Contracting Ltd. and Tristar Drywall and Acoustics Systems Inc. (Respondents) (*Withdrawn*)

1403-95-R: International Union of Bricklayers and Allied Craftsmen, Local 12 and Labourers' International Union of North America, Local 1081 (Applicant) v. Eddie A. Beland c.o.b. as E. Beland Masonry and/or E. Beland Masonry Limited and/or 959640 Ontario Inc. c.o.b. as Beland Masonry and/ or 1114136 Ontario Inc. c.o.b. as Core Tec. Contracting (Respondents) (*Granted*)

3397-95-R: International Union of Operating Engineers, Local 793 (Applicant) v. Sharon Advertising & Research o/a A.M.F. All Seasons Excavating; Roadway Concrete & Drain Inc. (Respondents) (*Granted*)

3673-95-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Inseal Contracting Inc. and Icynene Inc. (Respondents) (*Endorsed Settlement*)

3873-95-R: The Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. New Lomar General Contractors Limited, Top Lomar Masonry Limited, 1049086 Ontario Limited c.o.b. as Ericon General Contracting (Respondents) (*Endorsed Settlement*)

4109-95-R: International Union of Bricklayers and Allied Craftsmen Locals 12 and 31 (Applicant) v. Polcon Tile Constructive Interiors Ltd. and Polcon Tile Ltd. (Respondents) (*Endorsed Settlement*)

0022-96-R: United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. SBT Drywall & Acoustics Ltd., 944782 Ontario Limited, SBT Construction Ltd. and SBT Trough Ltd. (Respondents) (*Granted*)

0113-96-R: Windsor Regional Hospital (Applicant) v. International Brotherhood of Electrical Workers, Local 636 and Service Employees' Union, Local 210 (Respondents) (*Granted*)

0269-96-R; 0270-96-R; 0271-96-R: Lanark County Mental Health Services for Children and Youth (Applicant) v. Canadian Union of Public Employees and its Local 1559 and Ontario Public Service Employees Union and its Local 444 (Respondents); Child and Youth Wellness Centre of Leeds and Grenville (Applicant) v. Ontario Public Service Employees Union and its Local 444, Ontario Public Service Employees Union and its Local 433, and Ontario Public Service Employees Union and its Local 441 (Respondents); Frontenac, Lennox and Addington Children's Mental Health Agency (Applicant) v. Ontario Public Service Employees Union and its Local 444,

Ontario Public Service Employees Union and its Local 460, and Service Employees Union, Local 663 (Respondents) (*Endorsed Settlement*)

0288-96-R: Service Coordination for Persons with Special Needs/Coordination des services pour personnes ayant des besoins spéciaux (Applicant) v. Canadian Union of Public Employees, Local 2898 (“CUPE Local 2898”) (Respondent) (*Dismissed*)

0324-96-R: London Health Sciences Centre (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Granted*)

0686-96-R: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. Cameron-McIndoo Limited, PTI Camp Installations Ltd., Vencap Equities Alberta Limited, PTI Holdings (1983) Ltd., PTI Group Inc. (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

3622-95-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (Applicant) v. The Quaker Oats Company of Canada Limited (Respondent) v. Peter J. Guerin and a Group of Employees (Intervener) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0236-95-R: Kevin Smith and Clifford Wilkinson (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Elirpa Construction and Materials Limited (Intervener)

Unit: “All employees of Elirpa Construction and Materials Limited in the sewer and watermain sector of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (0 employees in unit) (*Granted*)

Number of names of persons on revised voters’ list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

3451-95-R: B A Banknote, A Division of Quebecor Printing Inc. (Applicant) v. International Association of Machinists and Aerospace Workers (Respondent) (*Terminated*)

3725-95-R: The Employees of Woodchester Nissan Inc. (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 512 (Respondent) v. Woodchester Nissan Inc. (Intervener)

Unit: “all employees of Woodchester Nissan Inc. working at 2560 Motorway Blvd. Mississauga, Ontario, save and except supervisor, office, clerical and sales staff” (16 employees in unit) (*Granted*)

Number of names of persons on revised voters’ list	16
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	16
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	13

3775-95-R: Employees of Cineplex Odeon Kanata Towne Centre (Applicant) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Respondent) v. Cineplex Odeon Kanata Towne Centre (Intervener) (*Withdrawn*)

3866-95-R: Ford Motor Company of Canada, Limited (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), and its Local 1256 (Respondent) (*Withdrawn*)

3867-95-R: Ford Motor Company of Canada, Limited (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), and its Local 195 (Respondent) (*Withdrawn*)

3900-95-R: Paul Diné (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Grant Paving & Materials Limited (Intervener)

Unit: "all construction employees, including part-time construction employees, and all employees covered by OLRB certificates in 0408-93-R, 0410-93-R, and 1396-93-R engaged in work covered by the classifications set forth in Schedule "A", save and except office and clerical employees, warehouse clerks and watchpersons employed outside of the Employer's main office in the Township of Dymond, non-working foremen and those above the rank of non-working foreman, part-time non-construction employees, office and camp cleaning staff, kitchen employees, sales persons, scalepersons, security guards, as well as graduate engineers, certified engineering technicians, and engineers in training working in an engineering capacity, and students" (80 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	92
Number of persons who cast ballots	70
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	20
Number of ballots marked against respondent	46
Number of ballots segregated and not counted	4

4007-95-R: Rodney Fulkerson, Jerome Lanoue, Steve Barwise, Charles Monpetit (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local Union 880, Windsor, Ontario (Respondent) v. Tilbury Concrete Transport Inc. (Intervener) (*Withdrawn*)

4112-95-R: The Employees of Erin Park Lexus Toyota (Erin Park Automotive Ltd.) (Applicant) v. National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada) (Respondent) v. Erin Park Automotive Limited (Intervener)

Unit: "all employees of Erin Park Lexus Toyota at 2411 Motorway Blvd. in the City of Mississauga" (33 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	30
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of ballots marked in favour of respondent	12
Number of ballots marked against respondent	16

4131-95-R: Alan Chau - Mechanic, Hertz Canada Ltd. (Applicant) v. United Food and Commercial Workers International Union Local 175 (Respondent) (*Dismissed*)

4188-95-R: Maurice Beaudoin and Larry Sawatsky (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 199 CAW (Respondent) v. Venest Industries, a division of Cosma International Inc. (Intervener)

Unit: "The Company recognizes the Union as the sole and exclusive bargaining agent of all of its employees in the City of St. Catharines, save and except foreperson, persons above the rank of foreperson, office, technical and sales staff" (60 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	60
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Number of persons who cast ballots	60
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	60
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	31
Number of ballots marked against respondent	29
Number of ballots segregated and not counted	0

4212-95-R: Bassam Salem (Applicant) v. Labourers' International Union of North America, Local 506 (Respondent) v. Fairview Fittings & Manufacturing Limited (Intervener)

Unit: "all employees of Fairview Fittings & Manufacturing Limited in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor, office, sales and clerical staff" (35 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	34
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	32
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	19
Number of ballots marked against respondent	13
Number of ballots segregated and not counted	2

0033-96-R: Michael Johnson (Applicant) v. Retail, Wholesale, Department Store Union Local 715 (Respondent)

Unit: "all employees of Ray Beland Distributors Ltd. at and out of the Regional Municipality of Sudbury, save and except managers and persons above the rank of manager" (5 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	3

0134-96-R: Velda Thompson representing the Unionized Employees of The Howard Johnson Plaza Hotel North York, for Termination of Bargaining Rights (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) v. The Howard Johnson Plaza Hotel, North York, (Intervenors)

Unit: "all employees of the Company located at 2737 Keele Street, Downsview, Ontario save and except Chefs, Sous Chefs, Assistant Housekeepers, Bar Managers and Supervisors, Office and Sales Staff (including Reservation Staff, Night Auditor and Front Desk Staff), accounting staff, secretaries and security staff" (150 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	192
Number of persons who cast ballots	94
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	92
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	45
Number of ballots marked against respondent	48
Number of ballots segregated and not counted	0

0151-96-R: Jan Bureau and Vicki Page, on their own behalf and on behalf of a group of employees of the Canadian Wildlife Federation (Applicant) v. United Steelworkers of America, Local 8327 (Respondent) v. Canadian Wildlife Federation (Intervener)

Unit: "all employees of the Canadian Wildlife Federation Inc. in the Regional Municipality of Ottawa-Carleton, save and except Supervisors, persons above the rank of Supervisor, Secretary to the Executive vice-president, and Secretary/Administrative Assistant to the General Manager" (27 employees in unit) (*Dismissed*)

0194-96-R: Beatrix Rowe and Beverley Besenyodi (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Community Living Huronia (Intervener)

Unit: "all employees of Community Living Huronia, save and except supervisors, those above the rank of supervisor, Foster and Relief Parents, Client Co-ordinator, students in field placements or employed pursuant to co-operative educational programs, persons employed on temporary contracts under Government incentive grants provided their employment is no longer than one (1) year (1950 hours) and office and clerical staff" (154 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	157
Number of persons listed as in dispute	0
Number of persons who cast ballots	124
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	124
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	94
Number of ballots marked against respondent	29
Number of ballots segregated and not counted	0

0292-96-R: David Singleton (Applicant) v. Graphic Communications International Union, Local 100-M (Respondent) v. Haddon Press Limited (Intervener) (*Dismissed*)

0301-96-R: David Baba, on his own behalf and on behalf of a group of employees of Suisha Gardens Limited (Applicant) v. The Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261, Chartered by the Hotel and Restaurant Employees and Bartenders' International Union, A.F.L.-C.I.O., C.L.C. (Respondent) v. Japan in Ottawa Ltd. c.o.b. as Suisha Gardens Limited (Intervener)

Unit: "all employees of Japan in Ottawa Ltd. c.o.b. as Suisha Gardens Limited who have completed their probationary period who are in the following classifications or groupings: head chef, chef, apprentice chef, dishwasher, waiter/waitress, bus person, bartender, cashier and hostess" (18 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	17
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	15

0352-96-R: Robert Scafe (Applicant) v. Labourers' International Union of North America, Local 1059 (Respondent) v. Gavigan Contracting Ltd. (Intervener)

Unit: "all construction labourers engaged on all construction projects within the Counties of Middlesex, Bruce, Elgin, Oxford, Perth and Huron, excluding projects within the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, office, clerical and engineering staff" (0 employees in unit) (*Dismissed*)

0422-96-R: August Brandao (Applicant) v. Teamsters Local Union No. 141 (Respondent) v. N - J Spivak Limited (Intervener)

Unit: “all employees of N - J Spivak Limited in the Township of Westminister, save and except batch/dispatcher, office and sales staff, persons above the rank of batcher/dispatcher, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (17 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	6
Number of ballots segregated and not counted	1

0579-96-R: Marc Desforges (Applicant) v. Local 715 of the Retail, Wholesale and Department Store Union District Council of the United Food and Commercial Workers International Union (Respondent) v. Flanagan Foodservice (Intervener)

Unit: “all employees of Flanagan Foodservice in and out of the Regional Municipality of Sudbury and the Districts of Cochrane and Algoma, save and except foreperson and persons above the rank of forepersons, sales, office and clerical staff” (13 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	10
Number of ballots segregated and not counted	2

0602-96-R: Antonio DeFusco et al (Applicant) v. Teamsters Local Union 230, Affiliated with the International Brotherhood of Teamsters (Respondent) v. Watson Building Supplies Co. Inc. (Intervener) (*Withdrawn*)

0679-96-R: E. Joseph Sevigny (Applicant) v. United Steelworkers of America Local 7282 District 6 (Respondent) v. Northland Iron & Metals N.I.M. Disposals Limited (Intervener) (*Dismissed*)

0808-96-R; 0809-96-R; 0810-96-R: Employees of Dale Enterprises, Sarnia, Ontario (Cabot Canada) (Applicant) v. Labourers' International Union of North America, Local 1089 (Respondent); Employees of Dale Enterprises (Nova Chemical Corunna, Ontario Division #876764) (Applicant) v. Labourers' International Union of North America, Local 1089 (Respondent) (*Terminated*)

0897-96-R: Tony Vandenenden, Bert Feurth, Jody Grisdale, Janucz Salwa & Guy Lehouillier (Applicant) v. Christian Labour Association of Canada (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3486-95-U: General Motors of Canada Limited (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers of Canada (CAW-CANADA), and Respondents listed on Schedule “A” (Respondent) (*Granted*)

0664-96-U: B A Banknote, A Division of Quebecor Printing Inc. (Ottawa Division) (Applicant) v. Ottawa Plate Printers', Plate Finishers', & Engravers' Union Local No. 6 (Respondent) (*Withdrawn*)

0671-96-U: International Care Corporation, c.o.b. as Regency Park Nursing Home/Retirement Centre (Applicant) v. Canadian Union of Public Employees and its Local 3593, and Julia Ardiel, Shelly Burdan, Loretto Perez, Jocelyn Bakema and Sonia Martin (Respondents) (*Endorsed Settlement*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

0609-96-U: Ontario Nurses' Association (Applicant) v. Marnwood Lifecare Centre (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2339-91-U: International Union of Operating Engineers, Local 865 (Applicant) v. The General Hospital of Port Arthur (Respondent) (*Withdrawn*)

1905-94-U: A.D.M. Agri-Industries Limited (Applicant) v. International Brotherhood of Electrical Workers, Local 773 (Respondent) (*Withdrawn*)

2569-94-U: International Brotherhood of Electrical Workers' Local 773 (Applicant) v. A.D.M. Agri-Industries Limited, Mike Piper c.o.b. as Advance Pipeline & Mechanical Contractors, 882870 Ontario Inc. operating as Advance Pipeline & Mechanical Contractors (Respondents) (*Dismissed*)

2699-94-U: Shawn L.G. McNally (Applicant) v. Ottawa Newspaper Guild, Local 205, of the Newspaper Guild, CLC, AFL-CIO and (Respondent) v. The Ottawa Citizen (A Division of Southam Inc.) (Intervener) (*Withdrawn*)

3511-94-U; 3553-94-U; 3562-94-U; 3563-94-U: Jeff Metcalf (Applicant) v. Ontario Public Service Employees Union and The Crown in Right of Ontario, as represented by the Management Board of Cabinet (Respondents); Roger P. Earnshaw (Applicant) v. Ontario Public Service Employees Union and The Crown in Right of Ontario, as represented by the Management Board of Cabinet (Respondents); Glenn Bearss (Applicant) v. Ontario Public Service Employees Union and The Crown in Right of Ontario, as represented by the Management Board of Cabinet (Respondents); Mike Robinson (Applicant) v. Ontario Public Service Employees Union and The Crown in Right of Ontario, as represented by the Management Board of Cabinet (Respondents) (*Dismissed*)

0309-95-U: Toronto-Central Ontario Building and Construction Trades Council, on its own behalf and on behalf of its affiliates except those identified in Appendix "A"; The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46; Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America; International Brotherhood of Painters and Allied Trades, Local 1891 and District Council 46; Drywall Acoustic, Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America, (Applicants) v. Gus Simone, Tony Iannuzzi, 410385 Ontario Limited c.o.b. as Maple Drywall, Nova Plumbing and Heating, Vitullo Plumbing Limited, Eastgate Plumbing; Bridgewood Plumbing and Heating Limited and Gabriel Spoletini, (Respondents) (*Withdrawn*)

0423-95-U: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Interior Systems Contractors Association, Labourers' International Union of North America, Local 183, Augustino Simone (Respondents) (*Withdrawn*)

0654-95-U: Barbara Vranic (Applicant) v. C.A.W. Canada and C.A.W. Local 1090 (Respondent) v. Chrysler Canada Ltd. (Intervener) (*Dismissed*)

1261-95-U: Catherine McNorton, Denny McNorton (Applicants) v. United Food and Commercial Workers Local 1000, & 1000A (Respondent) v. National Grocers Co. Ltd. and Loblaws Supermarkets Ltd. (Interveners) (*Dismissed*)

1356-95-U: Labourers' International Union of North America, Local 837 (Applicant) v. Hamilton-Wentworth Roman Catholic Separate School Board (Respondent) (*Withdrawn*)

1357-95-U: Ontario Public Service Employees Union (Applicant) v. Pay Equity Commission (Ministry of Labour) (Respondent) (*Withdrawn*)

1949-95-U: Edward Stuart (Applicant) v. United Steelworkers of America (Respondent) v. Walker Exhausts (Intervener) (*Dismissed*)

- 2115-95-U:** Teamsters Local Union 938 (Applicant) v. John's Cartage Ltd. (Respondent) (*Terminated*)
- 2327-95-U:** Shirley Thorne (Applicant) v. United Rubber, Cork, Linoleum and Plastic Workers of America, Local 822 (Respondent) v. Wynn's-Precision Canada Ltd. (Intervener) (*Dismissed*)
- 2708-95-U:** The Amalgamated Transit Union (Applicant) v. The Miller Group, Miller Paving Limited, Miller Transit Limited (Respondent) (*Dismissed*)
- 2920-95-U:** The Amalgamated Transit Union (Applicant) v. The Miller Group, Miller Paving Limited, Miller Transit Limited (Respondent) (*Dismissed*)
- 2965-95-U:** James John Mulrooney (Applicant) v. Richard Armstrong or Service Employees Union Local 268 (Respondent) v. Hogarth-Westmount Hospital (Intervener) (*Dismissed*)
- 3177-95-U:** United Steelworkers of America (Applicant) v. 1018433 Ontario Limited. c.o.b. as Michel's Baguette (Respondent) (*Withdrawn*)
- 3286-95-U:** Miller Transit Limited (Applicant) v. The Amalgamated Transit Union, David Witzel and Ray Doyle (Respondent) (*Dismissed*)
- 3484-95-U:** Communications, Energy and Paperworkers Union of Canada (Applicant) v. CAW Community Development Group (Ontario) Inc. (Respondent) (*Withdrawn*)
- 3485-95-U:** General Motors of Canada Limited (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-CANADA), and Additional Respondents listed on Schedule "A" (Respondent) (*Granted*)
- 3513-95-U:** Richard N. Buehlow (Applicant) v. I.B.E.W. Local 1788 (Respondent) v. Ontario Hydro (Intervener) (*Dismissed*)
- 3583-95-U:** Labourers' International Union of North America, Local 183 (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Respondent) (*Withdrawn*)
- 3600-95-U:** Christine Connor (Applicant) v. U.F.C.W. (Respondent) v. The Great Atlantic and Pacific Company of Canada, Limited (Intervener) (*Withdrawn*)
- 3633-95-U:** Gladys Marie Munghen (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) v. The Great Atlantic & Pacific Company of Canada Limited (Intervener) (*Withdrawn*)
- 3733-95-U:** David Mummery (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)
- 3798-95-U:** Sign and Pictorial Painters, Local 1630 International Brotherhood of Painters and Allied Trades (Applicant) v. Smith Sign Company Limited (Respondent) (*Withdrawn*)
- 3801-95-U:** Garnet Rowe (Applicant) v. Ontario Public Service Staff Union (Respondent) (*Withdrawn*)
- 3806-95-U:** Terri-Lynn Pickard (Applicant) v. Pebra Inc. and CAW Local 1987 (Respondents) (*Withdrawn*)
- 3819-95-U:** Erskin Turpin (Applicant) v. International Union of Operating Engineers, Local 796 (Respondent) v. Toronto District Heating Corporation (Intervener) (*Withdrawn*)
- 3821-95-U:** Randy Frederick (Applicant) v. Northern Ontario Joint Council of the Retail, Wholesale and Department Store Union Local 545 (North Bay) and 579 (Sudbury) United Food and Commercial Workers International Union (Respondent) v. The Great Atlantic and Pacific Company of Canada, Limited (Intervener) (*Dismissed*)
- 3874-95-U:** Canadian Union of Public Employees (Applicant) v. Supples Landing (Respondent) (*Withdrawn*)

3967-95-U: Health, Office & Professional Employees, A Division of Local 175, United Food and Commercial Workers Union (Applicant) v. Knollcrest Lodge (Respondent) v. Diversicare Management Services (Intervener) (*Withdrawn*)

3981-95-U: Mrs. Heather J. McDermott (Applicant) v. Mr. D. Gorman (Superintendent) (Respondent) (*Withdrawn*)

4024-95-U: Canadian Union of Public Employees and its Local 229, Canadian Union of Public Employees and its Local 254, and Canadian Union of Public Employees and its Local 1302 (Applicant) v. Queen's University (Respondent) (*Terminated*)

4052-95-U: Children's Aid Society of Metropolitan Toronto (Applicant) v. Canadian Union of Public Employees, Local 2316 (Respondent) (*Withdrawn*)

4106-95-U: Basavaraj (Bob) Patil (Applicant) v. Sunworthy Wallcoverings, a Division of the Borden Company, Limited (Respondent) (*Dismissed*)

4114-95-U: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. G. M. Finishers Ltd. (Respondent) (*Endorsed Settlement*)

4149-95-U: Bruce Michael Maclean (Applicant) v. Gary Peters and Clarence May (Respondent) v. Laidlaw Waste Systems Ltd. (Intervener) (*Withdrawn*)

4198-95-U: Independent Canadian Transit Union, Local 9 (Applicant) v. Sisters of Charity of Ottawa Health Service (Respondent) (*Withdrawn*)

4199-95-U: Mario Carpino (Applicant) v. Graphic Communications International Union Local N-1 (Respondent) (*Withdrawn*)

4205-95-U: Nazzareno Protomanni (Applicant) v. Canadian Union of Public Employees, Local 1165 (Respondent) (*Dismissed*)

4220-95-U: Myrtle Tomlinson (Applicant) v. Ontario Nurses' Association (Respondent) (*Dismissed*)

0015-96-U: Lynn Billings, John Findlay, Rick Scully, Don Patullo, Keith Bradamore (Applicant) v. Libbey Owens Ford of Canada; CAW National, Lorna Moses; CAW Local 2225, Lisa Marshall, Chairperson Local 2225; (Respondents) (*Withdrawn*)

0020-96-U: International Association of Bridge, Structural and Ornamental Iron Workers, Local 786 and Andre Blouin (Applicant) v. Delta Hudson Engineering Ltd. (Respondent) (*Withdrawn*)

0086-96-U: United Steelworkers of America and Danny Kelly (Applicant) v. Canada Investment Castings Inc., Canada Investment Castings Inc. Employees Association (Respondents) (*Withdrawn*)

0220-96-U; 0355-96-U: Christian Labour Association of Canada (Applicant) v. Euro Import & Export Inc. (Respondent) (*Endorsed Settlement*)

0225-96-U: Kenneth W. Morgan (Applicant) v. Local 69 of the Independent Paperworkers of Canada (Respondent) (*Withdrawn*)

0267-96-U: Communications, Energy and Paperworkers Union of Canada, Ottawa Typographical, Local 102-0 (Applicant) v. York Mailings (Respondent) (*Withdrawn*)

0314-96-U: Louise Vinette (Applicant) v. International Union of Operating Engineers Local 796 (Respondent) v. Montfort Hospital (Intervener) (*Withdrawn*)

0332-96-U: Teamsters Local Union 938 (Applicant) v. J. B. Rolland Papers Ltd. (Respondent) (*Dismissed*)

0370-96-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Quinte Learning Centre Ltd. (Respondent) (*Withdrawn*)

0385-96-U: Office and Professional Employees International Union, Local 343 (Applicant) v. Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Respondent) (*Withdrawn*)

0388-96-U: International Association of Machinists and Aerospace Workers, Local Lodge 1922 (Applicant) v. Orenda Aerospace Corporation (Respondent) (*Dismissed*)

0405-96-U: Toni Al-Hani (Applicant) v. Skyline Hotel (which is now the International Plaza), Hotel Employees Restaurant Employees Union, Local 75 (Respondents) (*Withdrawn*)

0416-96-U: York Mailings (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Ottawa Typographical, Local 102-0 (Respondent) (*Withdrawn*)

0429-96-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Canadian Pacific Hotels Corporation c.o.b. as the Chateau Laurier Hotel (Respondent) (*Withdrawn*)

0436-96-U: Service Employees International Union, Local 528 (Applicant) v. The Ontario Jockey Club (Respondent) (*Withdrawn*)

0442-96-U: Salah Hassan (Applicant) v. Metro Labour Education Centre and OPEIU, Local 343 (Respondents) (*Withdrawn*)

0458-96-U: Toni Marie Hayes (Applicant) v. London and District Service Workers' Union Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Respondent) (*Withdrawn*)

0500-96-U: Gamal Matta (Applicant) v. The Society of Ontario Hydro Professional and Administrative Employees (Respondent) (*Withdrawn*)

0508-96-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Loeb Arnprior (Respondent) (*Withdrawn*)

0509-96-U: Ontario Public Service Employees Union (Applicant) v. Hawkesbury and District General Hospital (Respondent) (*Withdrawn*)

0516-96-U: Industrial Wood & Allied Workers of Canada Local 2693 (IWA Canada, Local 2693) (Applicant) v. Gogama Forest Products Ltd. (Respondent) (*Withdrawn*)

0536-96-U: Carleton University Academic Staff Association (Applicant) v. Carleton University (Respondent) (*Withdrawn*)

0563-96-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Sterling Place Limited Partnership c.o.b. as Sterling Place Retirement Lodge (Respondent) (*Withdrawn*)

0571-96-U: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Watts Industries (Canada) Inc. (Respondent) (*Withdrawn*)

0573-96-U: Christian Labour Association of Canada (Applicant) v. Birmingham Lodge and Retirement Residences (Respondent) (*Withdrawn*)

0575-96-U: Dana Lennox - member Local 454 (Applicant) v. Local 454 - Ontario Public Service Employees Union Mr. David Calvert - President (Respondent) v. The Children's Aid Society of Ottawa-Carleton (Intervener) (*Withdrawn*)

0577-96-U: Manuel Lopes (Applicant) v. Labourers International Union of North America, Local 183 (Respondent) (*Endorsed Settlement*)

0610-96-U: Ontario Nurses' Association (Applicant) v. Marnwood Lifecare Centre (Respondent) (*Withdrawn*)

0611-96-U: Continuous Colour Coat Limited (Applicant) v. Thomas Eastman (Respondent) (*Granted*)

0612-96-U: J & D Flannigan Sales & Distribution Ltd. (Applicant) v. Local 715 of the Retail, Wholesale and Department Store Union District Council of the United Food and Commercial Workers International Union (Respondent) (*Withdrawn*)

0626-96-U: Heather Elizabeth Strathearn, Sharon Anne Lusk & Susan Wells (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Management Board Secretariat (Intervener) (*Dismissed*)

0634-96-U: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers (Applicant) v. Lafarge Canada Inc. (Respondent) (*Withdrawn*)

0635-96-U; 0734-96-U: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Metric Electric Inc. (Respondent); Metric Electric Inc. (Applicant) v. International Brotherhood of Electrical Workers, Local Union 353 (Respondent) (*Withdrawn*)

0648-96-U: Ms. Barbara Gasperian (Applicant) v. Dough Delight (Respondents) (*Withdrawn*)

0658-96-U: Arumainayaham Sathananthan (Applicant) v. Red Lobster Canada (Respondent) (*Dismissed*)

0693-96-U: John Van Gerven (Applicant) v. Armbro Transport (Respondents) (*Withdrawn*)

0694-96-U: John Van Gerven (Applicant) v. Teamsters Local 938 (Respondent) (*Dismissed*)

0710-96-U: Mathew Papalambrou (Applicant) v. I.L.G.W.U. (International Ladies Garment Workers Union), Toronto Dress and Sportswear Industry Welfare Funds (Local) (Respondents) (*Dismissed*)

0715-96-U: Jerzy Smiechowski (Applicant) v. The Metropolitan Toronto Housing Company Limited (Respondent) (*Dismissed*)

0726-96-U: Leszek Szymczyszyn (Applicant) v. Holland Hitch of Canada, Ltd. (Respondent) (*Dismissed*)

0730-96-U: Total Communication Environment Inc. (Applicant) v. Total Communication Environment Staff Association (Respondent) v. Canadian Union of Public Employees (Intervener) (*Withdrawn*)

0735-96-U: Martin Collins (Applicant) v. The Primrose Hotel, Cafe Vienna (Respondent) (*Dismissed*)

0746-96-U: Canadian Union of Public Employees, Local 282 (Applicant) v. Brant County Board of Education (Respondent) (*Withdrawn*)

0771-96-U: Ivan Car (Applicant) v. Local 454 - Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

0784-96-U: Leonardo Calce (Applicant) v. Maple Leaf Meats (Bartor Road) (Respondent) (*Dismissed*)

0850-96-U: Helga Schmidt (Applicant) v. President Danny Manczur C.U.P.E. Local 43 and the Canadian Union of Public Employees (Respondents) (*Dismissed*)

0851-96-U: Sarah Byrne (Applicant) v. Canadian Union of Public Employees (Respondent) (*Dismissed*)

0882-96-U: Barb Takacs (Applicant) v. Victoria Hospital, Union Local 220 (Respondents) (*Dismissed*)

0921-96-U: Michael B. Myers (Applicant) v. Premier Caskets Corp. (Respondent) (*Dismissed*)

0926-96-U: Paul Y. Berube (Applicant) v. A.G. Simpson Co. Ltd. Metal Stampings - Cambridge (Respondent) (*Dismissed*)

0943-96-U: Trung Van Le U.S.W.A. Local Union 9236 (Applicant) v. United Steelworkers of America (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

1904-94-M: A.D.M. Agri-Industries Limited (Applicant) v. International Brotherhood of Electrical Workers, Local 773 (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0668-96-M: Imperial Parking Limited (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Respondent) (*Granted*)

TRUSTEESHIP

0632-95-T: International Union of Operating Engineers (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0651-96-M: Ontario Public Service Employees Union (Applicant) v. The Niagara Parks Commission (Respondent) (*Dismissed*)

0858-96-M: Canadian Union of Public Employees and its Local 3110 (Applicant) v. The Corporation of the County of Simcoe (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1282-95-OH: Valentine J. M. Daley (Applicant) v. Sears Canada Inc. (Respondent) (*Withdrawn*)

2695-95-OH: Jose Raposo (Applicant) v. Hurley Corporation (Respondent) (*Withdrawn*)

3424-95-OH: Mr. Kirk Butler (Applicant) v. Cami Automotive Inc. (Respondent) (*Withdrawn*)

3983-95-OH: Serafim Sa (Applicant) v. K-Fab Pacific Coast Feather Canada (Respondent) (*Withdrawn*)

0177-96-OH: Omar Ali (Applicant) v. Mister Lube, a division of Imperial Oil (Respondent) (*Terminated*)

0261-96-OH: Paul Fong (Applicant) v. Ontario Hydro (Respondent) (*Dismissed*)

0361-96-OH: Paul Ward (Applicant) v. Stellarc Precision Bar Inc. (Respondent) (*Withdrawn*)

0437-96-OH: Tim Seigny (Applicant) v. SLH Transport Inc. (Respondent) (*Withdrawn*)

0450-96-OH: Mahendran Paraniurupasingan (Applicant) v. Polyfit Polyethylene Products Inc. (Respondent) (*Withdrawn*)

0501-96-OH: Gamal Matta (Applicant) v. Ontario Hydro (Respondent) (*Withdrawn*)

0569-96-OH: Ernie K Surge (Applicant) v. C.J.D. Inds. Supplies, Claudio D'Allesio (Respondent) (*Withdrawn*)

0695-96-OH: Deo Narayan (Applicant) v. Diversey Lever Canada Division of U L Canada Inc. (Respondent) (*Dismissed*)

CECBA - CONTRAVENTION OF THE ACT

3462-94-U; 3463-94-U: Wm. J. McLaughlin (Applicant) v. Ontario Public Service Employees Union and The Crown in Right of Ontario, as represented by the Management Board of Cabinet (Respondents) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

1023-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Bernel Masonry Ltd. (Respondent) (*Withdrawn*)

1032-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Clifford Masonry Ltd. (Respondent) (*Withdrawn*)

1039-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Squire Masonry Limited (Respondent) (*Withdrawn*)

1050-95-G: The International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Gem Campbell Terrazzo & Tile Inc. (Respondent) (*Withdrawn*)

1158-95-G; 1159-95-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Royal Star Contracting Ltd. and Tristar Drywall & Acoustic Systems Inc. (Respondents); Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Royal Star Contracting Ltd. and Tristar Drywall and Acoustics Systems Inc. (Respondents) (*Withdrawn*)

3185-95-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. R & B Mechanical Services Inc. (Respondent) (*Granted*)

3460-95-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Trio Roofing Ltd. (Respondent) (*Withdrawn*)

3713-95-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Trio Roofing Ltd., Trio Roofing System Inc. (Respondents) (*Granted*)

3763-95-G: International Union of Elevator Constructors Local No. 90 (Applicant) v. Otis Canada Inc. (Respondent) (*Terminated*)

3776-95-G: United Brotherhood of Carpenters & Joiners of America Local 494 (Applicant) v. SBT Drywall & Acoustics Ltd., SBT Construction Ltd., SBT Trough Ltd. (Respondents) (*Granted*)

3825-95-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. M. Fanone Plumbing Mechanical Contractor Ltd. (Respondent) (*Granted*)

3972-95-G: International Union of Bricklayers & Allied Craftsmen, Local 12 (Applicant) v. Polcon Tile Constructive Interiors Ltd. (Respondent) (*Endorsed Settlement*)

4008-95-G: Labourers' International Union of North America, Local 493 (Applicant) v. R.M. Belanger Limited (Respondent) (*Withdrawn*)

4218-95-G; 4219-95-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Nation Drywall Ltd. (Respondent) (*Granted*)

0188-96-G; 0189-96-G: Local Union 785 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Delgant Construction Ltd. (Respondent) (*Endorsed Settlement*)

0191-96-G: Sheet Metal Workers' International Association Local Union No. 285 (Applicant) v. Acura Sheet Metal Co. Ltd. (Respondent) (*Granted*)

0460-96-G; 0557-96-G: United Brotherhood of Carpenters & Joiners of America Local 494 (Applicant) v. Malec Ceiling & Wall Contracting (Respondent) (*Endorsed Settlement*)

0539-96-G: Schindler Elevator Corporation (Applicant) v. International Union of Elevator Constructors, Local 50, Paul Moussei, Joseph Medeiros, Ed McKechnie, Bill Baxter, Sam Hamilton, Andrew McIntyre (Respondent) (*Granted*)

0559-96-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Les Enterprises D.V. Enr. (Respondent) (*Granted*)

0560-96-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dome Carpets Limited (Respondent) (*Withdrawn*)

0589-96-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Corman Masonry Ltd. (Respondent) (*Withdrawn*)

0590-96-G: Labourers' International Union of North America, Local 183 (Applicant) v. Armarcord Carpentry Ltd. (Respondent) (*Endorsed Settlement*)

0608-96-G: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. Castlewall Developments Ltd. (Respondent) (*Terminated*)

0650-96-G: International Union of Operating Engineers, Local 793 (Applicant) v. Sheafer-Townsend Construction Ltd./Davy Sheafer Townsend Ltd. (Respondent) (*Withdrawn*)

0669-96-G: International Brotherhood of Electrical Workers, Local Union 402 (Applicant) v. E.S. Fox Limited (Respondent) (*Withdrawn*)

0683-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Malfar Mechanical (Respondent) (*Endorsed Settlement*)

0685-96-G: United Brotherhood of Carpenters and Joiners of America, Local 1669 (Applicant) v. Cameron-McIndoo Limited, PTI Camp Installations Ltd. (Respondents) (*Withdrawn*)

0687-96-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bondfield Construction Company (1983) Ltd. (Respondent) (*Endorsed Settlement*)

0709-96-G: International Union of Operating Engineers, Local 793 (Applicant) v. West Front Construction Ltd. (Respondent) (*Granted*)

0714-96-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Robby Electric Limited (Respondent) (*Granted*)

0721-96-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Sera Construction Limited (Respondent) (*Granted*)

0722-96-G: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Skarlan Waterproofing Inc. (Respondent) (*Withdrawn*)

0731-96-G: Labourers' International Union of North America, Local 183 (Applicant) v. Elmford Construction Co. Ltd. (Respondent) (*Granted*)

0742-96-G: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Guardian Glass Ltd. (Respondent) (*Withdrawn*)

0757-96-G: Labourers' International Union of North America, Local 506 (Applicant) v. Sera Construction Limited (Respondent) (*Granted*)

0787-96-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Zer-O-Loc Enterprises Ltd. (Respondent) (*Endorsed Settlement*)

0794-96-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Lynx Cabling Systems Ltd. (Respondent) (*Withdrawn*)

0799-96-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. J.G. Roger Electric (1981) Ltd. (Respondent) (*Withdrawn*)

0806-96-G: Labourers' International Union of North America, Local 597 (Applicant) v. Ross and Anglin Ontario Ltd. (Respondent) (*Granted*)

0864-96-G: International Brotherhood of Electrical Workers, Local Union 402 (Applicant) v. E.S. Fox Limited (Respondent) (*Withdrawn*)

0865-96-G: International Brotherhood of Painters and Allied Trades, Ontario Council (Applicant) v. Conrad Painting Limited (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE SMOKING IN THE WORKPLACE ACT

0384-96-M: Theresa Branagh (Applicant) v. Comfort Inn, Barrie (Respondent) (*Withdrawn*)

REFERRAL FROM MINISTER (SEC. 3(2)) HLDA

0428-96-M: 582958 Ontario Ltd. c.o.b. as The Grenadier Retirement Residence (Applicant) v. Service Employees International Union, Local 204 (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3805-94-U: Angello Malamas (Applicant) v. Metropolitan Chestnut Park Hotel (Respondent) (*Denied*)

0559-95-OH: Rudolf F. Papp (Applicant) v. Chedoke McMaster Hospitals (Respondent) (*Denied*)

1755-95-U: Embaye Melekin (Applicant) v. The National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, Local 112 (Respondent) v. de Havilland Inc. (Intervener) (*Denied*)

2147-95-OH: John Cheresna (Applicant) v. Les Constructions H.G.B. Inc. (Respondent) (*Dismissed*)

2518-95-U: Beverley A. Wright and Agnes Verhoeven (Warren) (Applicants) v. Ontario Public Service Employees Union, The Crown in Right of Ontario as represented by the Ministry of Health (Respondents) (*Denied*)

0485-96-U: Janet Watts (Applicant) v. Community Life Inc. (Respondent) (*Dismissed*)

SECTOR DETERMINATION (SECTION 153) (FORMERLY S.150)

2181-92-M: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Duntri Construction Ltd. (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council, The Metropolitan Toronto Sewer and Watermain Contractors Association (Intervenors) (*Granted*)

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1996

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1448-95-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Culliton Brothers Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all electricians and electricians' apprentices in the employ of Culliton Brothers Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians apprentices in the employ of Culliton Brothers Limited in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (30 employees in unit)

2093-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. 407495 Ontario Limited, c.o.b. as Bucci Tile & Carpet and/or C.B.F. Construction Co. (Respondent)

Unit: "all marble, tile and terrazzo, cement masons and their helpers and their respective apprentices and improvers, in the employ of 407495 Ontario Limited, c.o.b. as Bucci Tile & Carpet and/or C.B.F. Construction Co. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2457-95-R: Sheet Metal Workers' International Association, Local Union 285 (Applicant) v. Custom Gas Heating Limited o/a National Heating & Air Conditioning Sales (Respondent)

Unit: "all sheet metal workers and registered apprentice sheet metal workers employed by Custom Gas Heating Limited o/a National Heating & Air Conditioning Sales in the residential sector of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Bargaining Agents Certified Subsequent to Vote

2603-95-R: Canadian Union of Public Employees Local 79 ("the union") (Applicant) v. The Corporation of the City of Toronto ("the employer" or "the City") (Respondent)

Unit: "all casual employees employed by The Corporation of the City of Toronto in the Recreation Division of the Department of Parks and Recreation, save and except supervisors, persons above the rank of supervisor, and persons for whom the applicant or any other trade union held bargaining rights as of October 10, 1995" (2414 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	2523
Number of persons who cast ballots	342
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	332
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	4

Number of spoiled ballots	2
Number of ballots marked in favour of applicant	246
Number of ballots marked against applicant	84
Number of ballots segregated and not counted	10

3804-95-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. 486458 Ontario Inc., o/a Canadian Star Aluminum (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of 486458 Ontario Inc., o/a Canadian Star Aluminum in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of 486458 Ontario Inc., o/a Canadian Star Aluminum in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	12
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	8

3974-95-R: The Canadian Union of Operating Engineers and General Workers (Applicant) v. Toronto District Heating Corporation (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Unit: "all employees classified as stationary engineers and their helpers and all other classifications listed in Article 27.01 of the collective agreement between Toronto District Heating Corporation and the International Union of Operating Engineers, Local 796 effective January 1, 1993 to March 31, 1996, employed by the Corporation in Metropolitan Toronto at the Walton Street Steam Plant, save and except the Chief Engineer and Assistant Chief Engineer and persons above the rank of Assistant Chief Engineer" (12 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

4210-95-R: Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Applicant) v. TTI Industrial, Division of 1154592 Ontario Inc. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of TTI Industrial, Division of 1154592 Ontario Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of TTI Industrial, Division of 1154592 Ontario Inc. in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3

Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0209-96-R: United Food and Commercial Workers International Union (Applicant) v. Laurentian Spring Valley Inc. c.o.b. as Spring Valley Water Co. (Respondent)

Unit: "Full-time: all employees of Laurentian Spring Valley Inc., c.o.b. as Spring Valley Water Co., in the City of Vaughan, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor and office, clerical and outside sales staff; Part-time: all employees of Laurentian Spring Valley Inc., c.o.b. as Spring Valley Water Co., in the City of Vaughan, save and except supervisors, persons above the rank of supervisor, office, clerical and outside sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (34 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	27
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	27
Number of spoiled ballots	1

0323-96-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 853 (Applicant) v. Hudson Fire Systems Inc. (Respondent)

Unit: "all journeymen and apprentice sprinkler fitters in the employ of Hudson Fire Systems Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sprinkler fitters in the employ of Hudson Fire Systems Inc. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, and the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	8
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	4

0540-96-R: United Food and Commercial Workers International Union (Applicant) v. North Bay and District Society for the Prevention of Cruelty to Animals (Respondent)

Unit: "all employees of North Bay and District Society for the Prevention of Cruelty to Animals in the District of Nipissing, save and except Shelter Supervisor and persons above the rank of Shelter Supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons listed as in dispute	0
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0

Number of ballots segregated and not counted

1

0666-96-R: The Canadian Power Engineers and Skilled Trades Union (Applicant) v. The University of Western Ontario (Respondent) v. Canadian Union of Operating Engineers and General Workers (Intervener)

Unit: "all stationary engineers and persons engaged primarily as their helpers employed by the main Power Plant and other remote plants, of The University of Western Ontario, in the City of London, save and except the Supervisors, persons above the rank of Supervisor, office staff, technicians, students employed during the school or University vacation period and persons regularly employed for not more than 24 hours per week" (9 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4

0667-96-R: The Canadian Power Engineers and Skilled Trades Union (Applicant) v. The University of Windsor (Respondent) v. Canadian Union of Operating Engineers and General Workers (Intervener)

Unit: "all refrigeration and compressor operators, stationary engineers and their helpers employed by The University of Windsor, in the City of Windsor, save and except chief operating engineer and preventive maintenance supervisor and persons above the rank of chief operating engineer and preventive maintenance supervisor" (14 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	2

0670-96-R: United Steelworkers of America (Applicant) v. Serca Foodservice Inc. (Respondent) v. Teamsters Local Union 419 (Intervener)

Unit: "all employees of Serca Foodservice Inc., at its Vaughan Distribution Centre, save and except supervisors, persons above the rank of supervisor, office and clerical sales staff" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0

0717-96-R: The Canadian Union of Public Employees (Applicant) v. Total Communication Environment Inc. (Respondent) v. Total Communication Environment Staff Association (Intervener)

Unit: "all employees of Total Communication Environment Inc. in the Regional Municipality of Ottawa-Carleton, save and except confidential secretary, payroll clerk, supervisors and persons above the rank of supervisor" (70 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	76
Number of persons who cast ballots	45
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	45
Number of ballots marked in favour of applicant	24
Number of ballots marked in favour of intervener	21

0748-96-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Park N Fly (Respondent)

Unit: "all employees of Park N Fly servicing the Lester B. Pearson International Airport, save and except supervisors, persons above the rank of supervisor, office and sales staff" (122 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	128
Number of persons listed as in dispute	0
Number of persons who cast ballots	103
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	95
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	65
Number of ballots marked against applicant	30
Number of ballots segregated and not counted	8

0762-96-R: United Steelworkers of America (Applicant) v. Waterloo Furniture Components Ltd. c.o.b. as Jacmorr International Inc. (Respondent) v. Jacmorr Shop Committee (Affected Party)

Unit: "all employees of Waterloo Furniture Components Ltd. c.o.b. as Jacmorr International Inc. in the City of Kitchener, save and except forepersons, persons above the rank of foreperson, office, clerical, technical and engineering and sales staff" (81 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	81
Number of persons who cast ballots	78
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	78
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	75
Number of ballots marked in favour of intervener	3

0764-96-R: Ontario Nurses' Association (Applicant) v. MacGowan Nursing Homes Ltd. (Respondent)

Unit: "all registered and graduate nurses employed at MacGowan Nursing Homes Ltd. c.o.b. as Braemar Retirement Centre in the Town of Wingham, save and except the Director of Nursing and persons above the rank of Director of Nursing" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0770-96-R: Canadian Union of Public Employees (Applicant) v. Fort Frances Rainy River Board of Education (Respondent)

Unit: "all school bus drivers of the Fort Frances - Rainy River Board of Education in the District of Rainy River, save and except supervisors and those above the rank of supervisor" (20 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17

Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	4

0791-96-R: Bakery, Confectionery and Tobacco Workers' International Union, Local 264 (Applicant) v. Advance Kamak Distribution Centers Ltd. (Respondent)

Unit: "all employees of Advance Kamak Distribution Centers Ltd. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, and office staff" (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	4

0802-96-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. The Business Depot Ltd. (Respondent)

Unit: "all employees of The Business Depot Ltd. located at 1936 McCowan Road, Scarborough, save and except Assistant Managers and persons above the rank of Assistant Manager" (38 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	38
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	2

0804-96-R: Communications, Energy and Paperworkers Union of Canada, Local 87-M Southern Ontario Newspaper Guild (Applicant) v. Metroland Printing, Publishing and Distributing Ltd. (Respondent)

Unit: "all employees of Metroland Printing, Publishing and Distributing Ltd. in its advertising sales departments in the City of Barrie, save and except supervisors and persons above the rank of supervisor" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

0848-96-R: The Employees' Association of K-Mart (Canada) (Applicant) v. Kmart Canada Limited (Respondent)

Unit: "all office, clerical, dispatch and maintenance employees of Kmart Canada Limited employed at its Distribution Centre in the City of Brampton, save and except supervisors, persons above the rank of supervisor, employees engaged in a confidential capacity, students employed during the school vacation period, temporary

employees and persons for whom any trade union held bargaining rights as of June 17, 1996" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	1

0857-96-R: Hospitality, Commercial and Service Employees Union of Canada (Applicant) v. Loyal Order of Moose, Fort William Lodge No. 844 (Respondent)

Unit: "all employees of the Loyal Order of Moose, Fort William Lodge No. 844 in the City of Thunder Bay, save and except the Manager and persons above the rank of Manager" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

0898-96-R: Canadian Union of Public Employees (Applicant) v. Madison Avenue Housing and Support Services, Inc. (Respondent)

Unit: "all employees of Madison Avenue Housing and Support Services, Inc. in the Municipality of Metropolitan Toronto, save and except Team Leaders, and persons above the rank of Team Leader," (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

0907-96-R: Communications, Energy & Paperworkers Union of Canada (CEP) (Applicant) v. Olympus Plastics Ltd. (Respondent)

Unit: "all employees of Olympus Plastics Ltd. in the Town of Richmond Hill save and except supervisors, persons above the rank of supervisor, office and clerical staff, quality control supervisors, warehouse supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period," (55 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	66
Number of persons who cast ballots	48
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	42

Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	34
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	6

0909-96-R: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. The Jackson-Lewis Company Inc. (Respondent)

Unit: "all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the employ of The Jackson-Lewis Company Inc. in all sectors of the construction industry, save and except the industrial, commercial and institutional sector of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquering and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0951-96-R: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Feder Construction Ltd. (Respondent)

Unit: "all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the employ of Feder Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the employ of Feder Construction Ltd. in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquering and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

0961-96-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local 67 (Applicants) v. Lee & Lehmann Plumbing & Heating Limited (Respondent)

Unit: “all journeymen and apprentice plumbers and pipefitters in the employ of Lee & Lehmann Plumbing & Heating Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice plumbers and pipefitters in the employ of Lee & Lehmann Plumbing & Heating Limited in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk and the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	2

0990-96-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Extendicare (Canada) Inc. (Respondent)

Unit: “all registered nurses employed in a nursing capacity, regularly employed for not more than 24 hours per week by Extendicare (Canada) Inc. in Port Stanley, save and except head nurse, persons above the rank of head nurse, and persons in bargaining units for whom any trade union held bargaining rights as of July 2, 1996” (6 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	3

0995-96-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. The Pembroke Observer, A Division of Hollinger Inc. (Respondent)

Unit: “all employees of The Pembroke Observer, A Division of Hollinger Inc., in the City of Pembroke, save and except manager, persons above the rank of manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, and persons in bargaining units for whom any trade union held bargaining rights as of July 2, 1996” (17 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	1

1025-96-R: United Food & Commercial Workers International Union AFL-CIO-CLC (Applicant) v. Doornekamp Brothers Trucking Limited (Respondent)

Unit: “all employees of Doornekamp Brothers Trucking Limited in the Regional Municipality of Niagara, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

1026-96-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Display Arts of Toronto (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Display Arts of Toronto in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Display Arts of Toronto in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	4

1045-96-R: International Brotherhood of Painters & Allied Trades, Glaziers Local 1819 (Applicant) v. Top Glass & Mirror Inc. (Respondent)

Unit: "all glaziers and glaziers' apprentices in the employ of Top Glass & Mirror Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all glaziers and glaziers' apprentices in the employ of Top Glass & Mirror Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non- working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

Applications for Certification Dismissed Without Vote

4142-94-R: United Steelworkers of America (Applicant) v. University Hospital (Respondent)

0647-96-R: Service Employees Union, Local 210 (Applicant) v. Windsor Regional Hospital (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

0962-96-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Falconbridge Limited, Kidd Creek Division (Respondent)

0963-96-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Falconbridge Limited, Kidd Creek Division (Respondent)

1220-96-R: Ronald Gravelle (Applicant) v. Northland Iron and Metals and N.I.M. Disposals (Respondent)

Applications for Certification Dismissed Subsequent to Vote

0549-96-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local 663 (Applicants) v. Augment Services Ltd. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Augment Services Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Augment Services Ltd. in all other sectors in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

0636-96-R: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Metric Electric Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Metric Electric Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of Metric Electric Inc. in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria; and the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	1

0737-96-R: United Steelworkers of America (Applicant) v. Midland Transport Ltd., c.o.b. as Midland Courier (Respondent)

Unit: "all employees of Midland Transport Ltd. c.o.b. as Midland Courier, save and except dependent contractors and office and clerical staff" (17 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	8

0750-96-R: Union of Needletrades, Industrial and Textile Employees (Applicant) v. U.S.E. Hickson Products Ltd. (Respondent)

Unit: "all employees of U.S.E. Hickson Products Ltd. in the Municipality of Metropolitan Toronto, save and except lead hands, persons above the rank of lead hand, laboratory technicians, and office and sales staff" (35 employees in unit)

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	19

1000-96-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Astro Dairy Products Limited (Respondent)

Unit: "all employees of Astro Dairy Products Ltd. at its plant at 25 Rakely Court, Etobicoke, Ontario save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff and truck drivers." (95 employees in unit)

Number of names of persons on revised voters' list	105
Number of persons who cast ballots	97
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	86
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	69
Number of ballots segregated and not counted	8

1002-96-R: Teamsters Local Union No. 879 (Applicant) v. Uniflow Drain Services Inc. (Respondent)

Unit: "all employees of Uniflow Drain Services Inc. employed in and out of the Regional Municipality of Peel, save and except dispatchers, persons above the rank of dispatchers, office and sales staff" (8 employees in unit)

Number of persons who cast ballots	8
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	8
Number of segregated ballots cast by persons whose names appear on voters' list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

1003-96-R: Canadian Union of Public Employees (Applicant) v. The Children's Aid Society of the City of Guelph and the County of Wellington c.o.b. Family & Children's Services of Guelph & Wellington County (Respondent)

Unit: "all employees of Family & Children's Services of Guelph and Wellington County, save and except Managers, persons above the rank of Managers, Human Resources Assistant and Executive Assistant" (49 employees in unit)

Number of names of persons on revised voters' list	82
Number of persons who cast ballots	65
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	49
Number of segregated ballots cast by persons whose names appear on voter's list	16

Number of spoiled ballots	1
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	27
Number of ballots segregated and not counted	11

1007-96-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Falconbridge Limited, Kidd Creek Division (Respondent)

Unit: "all production and maintenance employees of Kidd Creek Division of Falconbridge Limited in the District of Cochrane, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staffs, security guards and students employed during the school vacation period." (950 employees in unit)

Number of names of persons on revised voters' list	1556
Number of persons who cast ballots	1369
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1366
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	6
Number of ballots marked in favour of applicant	215
Number of ballots marked against applicant	1145
Number of ballots segregated and not counted	3

1009-96-R: I.W.A. Canada (Applicant) v. Acryx Industries Inc. (Respondent)

Unit: "all employees of Acryx Industries Inc. in the Province of Ontario, save and except supervisors, persons above the rank of supervisors, engineers, research and development, purchasing, installers, office, clerical, sales staff, students, and employees working less than 24 hours per week" (51 employees in unit)

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	48
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	47
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	33
Number of ballots segregated and not counted	1

Applications for Certification Withdrawn

3942-93-R: Canadian Security Union (Applicant) v. Thunder Bay Security and Investigations Inc. (Respondent)

0622-94-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Alexanian & Sons Limited (Respondent)

0452-96-R: Association of Allied Health Professionals: Ontario (Applicant) v. Perth and Smiths Falls District Hospital (Respondent) v. Ontario Public Service Employees Union (Intervener)

0478-96-R: Bakery, Confectionery and Tobacco Workers' International Union, Local 264 (Applicant) v. Delta Beverages Inc. (Respondent)

1050-96-R: Ontario Nurses' Association (Applicant) v. Humber Memorial Hospital (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

0894-95-R: Labourers' International Union of North America, Local 1059 (Applicant) v. J. & W. Corp. O/A Servicemaster Contract Services of London (Respondent) (*Withdrawn*)

0898-95-R: Labourers' International Union of North America, Local 1059 (Applicant) v. David Martin Enterprises (London) Limited o/a Martin Building Maintenance (Respondent) (*Withdrawn*)

2000-95-R: Retail, Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Murphy Distributing Ltd. (Respondent) (*Terminated*)

2403-95-R: Communications, Energy and Paperworkers Union of Canada (CEP) (Applicant) v. 3176461 Canada Inc. carrying on business as Bell Realty Services, and 3176479 Canada Inc. carrying on business as Bell Distribution Services (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1752-94-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. C & D Services, A Division of 795150 Ontario Inc., 874113 Ontario Inc. c.o.b. as Central Power Systems, R & B Electric, Dent Enterprise, Blaine Hawkins, Bonnie McCoy, Falco Electric Limited, L & L Services and Fern Laurin (Respondents) (*Granted*)

3130-94-R; 3131-94-R: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Joe Pantalone Masonry Co. Ltd., 882761 Ontario Ltd. c.o.b. as Stevco Masonry (Respondents); Labourers' International Union of North America, Local 527 (Applicant) v. Joe Pantalone Masonry Co. Ltd., Rosto Construction Ltd., 882761 Ontario Ltd, c.o.b. as Stevco Masonry (Respondents) (*Dismissed*)

4590-94-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Rocket Plumbers Limited, Velco Contracting, Velco Plumbing Ltd., Vaelco Plumbing Ltd., Velco Plumbers Ltd. (Respondents) (*Dismissed*)

4637-94-R: International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. Magnum Glass Inc., Magnum Associates Ltd., Magnum Glass Installations Ltd., Hardie Glass & Aluminum Inc. (Respondents) (*Granted*)

3043-95-R: Graphic Communications International Union, Local 100-M (Applicant) v. Hartley Gibson Company Limited and Versatel Corporation Services Limited (Respondents) (*Dismissed*)

3045-95-R; 3205-95-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. C.A.R.V. Masonry Inc. and EM-95 Construction Limited (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America, Local's 625 & 1059 and Christian Labour Association of Canada (Interveners); Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America, Locals 625 and 1059 (Applicant) v. C.A.R.V. Masonry Inc. and EM-95 Construction Ltd. (Respondents) v. Christian Labour Association of Canada (Intervener) (*Granted*)

4002-95-R: International Union of Bricklayers & Allied Craftsmen, Local No. 6 (Applicant) v. Tom T. Carpet & Ceramic, D & T Tile Ltd., D & T Val - Tile Inc., D & T Floor Coverings Inc. (Respondents) (*Granted*)

4064-95-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. 889459 Ontario Inc. c.o.b. Deck Wall Forming and 763790 Ontario Inc. c.o.b. Can Tech Forming (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Withdrawn*)

0365-96-R: United Food and Commercial Workers' International Union, Local 175 & 633 (Applicant) v. 1163133 Ontario Limited c.o.b. as Days Inn (Respondents) (*Withdrawn*)

0472-96-R: International Brotherhood of Painters and Allied Trades, and Glaziers, Local 1819 (Applicant) v. Bramalea Glass & Mirror Limited and Acton Glass & Aluminum Ltd. (Respondents) (*Endorsed Settlement*)

0720-96-R: Teamsters Local Union 419 (Applicant) v. Serca Foodservices Inc. and Davis Distributing Limited (Respondents) v. United Steelworkers of America (Intervener) (*Dismissed*)

0869-96-R: Canadian Union of Postal Workers (Applicant) v. Mister Gallant Services Ltd. and Windsor Proclean Services Inc. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

1752-94-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. C & D Services, A Division of 795150 Ontario Inc., 874113 Ontario Inc. c.o.b. as Central Power Systems, R & B Electric, Dent Enterprise, Blaine Hawkins, Bonnie McCoy, Falco Electric Limited, L & L Services and Fern Laurin (Respondents) (*Granted*)

3130-94-R; 3131-94-R: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Joe Pantalone Masonry Co. Ltd., 882761 Ontario Ltd, c.o.b. as Stevco Masonry (Respondents); Labourers' International Union of North America, Local 527 (Applicant) v. Joe Pantalone Masonry Co. Ltd., Rosto Construction Ltd., 882761 Ontario Ltd, c.o.b. as Stevco Masonry (Respondents) (*Dismissed*)

4590-94-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Rocket Plumbers Limited, Velco Contracting, Velco Plumbing Ltd., Vaelco Plumbing Ltd., Velco Plumbers Ltd. (Respondents) (*Dismissed*)

4637-94-R: International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. Magnum Glass Inc., Magnum Associates Ltd., Magnum Glass Installations Ltd., Hardie Glass & Aluminum Inc. (Respondents) (*Granted*)

2404-95-R: Communications, Energy and Paperworkers Union of Canada (CEP) (Applicant) v. Bell Canada, 3176461 Canada Inc. carrying on business as Bell Realty Services, and 3176479 Canada Inc. carrying on business as Bell Distribution Services (Respondents) (*Withdrawn*)

3043-95-R: Graphic Communications International Union, Local 100-M (Applicant) v. Hartley Gibson Company Limited and Versatel Corporation Services Limited (Respondents) (*Dismissed*)

3045-95-R; 3205-95-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. C.A.R.V. Masonry Inc. and EM-95 Construction Limited (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America, Local's 625 & 1059 and Christian Labour Association of Canada (Intervenors); Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America, Locals 625 and 1059 (Applicant) v. C.A.R.V. Masonry Inc. and EM-95 Construction Ltd. (Respondents) v. Christian Labour Association of Canada (Intervener) (*Granted*)

4002-95-R: International Union of Bricklayers & Allied Craftsmen, Local No. 6 (Applicant) v. Tom T. Carpet & Ceramic, D & T Tile Ltd., D & T Val - Tile Inc., D & T Floor Coverings Inc. (Respondents) (*Granted*)

4064-95-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. 889459 Ontario Inc. c.o.b. Deck Wall Forming and 763790 Ontario Inc. c.o.b. Can Tech Forming (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Withdrawn*)

0365-96-R: United Food and Commercial Workers' International Union, Local 175 & 633 (Applicant) v. 1163133 Ontario Limited c.o.b. as Days Inn (Respondents) (*Withdrawn*)

0472-96-R: International Brotherhood of Painters and Allied Trades, and Glaziers, Local 1819 (Applicant) v. Bramalea Glass & Mirror Limited and , Acton Glass & Aluminum Ltd. (Respondents) (*Endorsed Settlement*)

0720-96-R: Teamsters Local Union 419 (Applicant) v. Serca Foodservices Inc. and Davis Distributing Limited (Respondents) v. United Steelworkers of America (Intervener) (*Dismissed*)

0870-96-R: Canadian Union of Postal Workers (Applicant) v. Mister Gallant Services Ltd. and Windsor Proclean Services Inc. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0487-95-R: Shawn Evans on his own behalf and on behalf of a group of employees of 729084 Ontario Limited c.o.b. as Premiere Cable Construction (Applicant) v. Labourers' International Union of North America, Ontario District council on its own behalf and on behalf of all other affiliated bargaining agents of The Labourers' International Union of North America, Ontario Provincial District Council (Respondent) v. 729084 Ontario Limited c.o.b. as Premiere Cable (Intervener) (*Terminated*)

0640-96-R: Ram Seenanan, on his own behalf and on behalf of a group of employees of Metro Taxi Ltd. c.o.b. as Capital Taxi, operating as taxi owners and/or taxi drivers (Applicant) v. United Steelworkers of America (Respondent) v. Metro Taxi Ltd. c.o.b. as Capital Taxi (Intervener)

Unit: "all employees of Metro Taxi Ltd. c.o.b. as Capital Taxi owners and/or taxi drivers in the Cities of Ottawa, Vanier and Gloucester, save and except supervisors, dispatchers, telephone staff, multi car/multi plate owners, persons above the rank of supervisor and office and clerical staff" (150 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	164
Number of persons who cast ballots	142
Number of spoiled ballots	4
Number of ballots marked in favour of respondent	61
Number of ballots marked against respondent	73
Number of ballots segregated and not counted	4

0684-96-R: Craig Noakes (Applicant) v. Retail Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Respondent) v. Nivel Inc. (Intervener)

Unit: "all employees of Nivel Inc. in the Municipality of Metropolitan Toronto, save and except Managers, persons above the rank of Manager, office and clerical staff, and persons regularly employed for not more than 24 hours per week" (11 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	10

0701-96-R: Ms. Jennifer Militello (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Best Western Cobourg Motor Inn (Intervener)

Unit: "all employees of the Cobourg Motor Inn, save and except supervisor, persons above the rank of supervisor, office and clerical staff, persons employed for not more than 24 hours per week, and students employed during the school vacation period" (14 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	7
Number of ballots segregated and not counted	0

0733-96-R: Penny Campbell, Steves Music Store (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of United Steelworkers of America, Local 1000 (Respondent) v. Steve Kirman's Music Ltd., c.o.b. Steve's Music Store (Intervener)

Unit: "all employees of Steve Kirmans Music, c.o.b. as Steves Music Store in the Municipality of Metropolitan Toronto, save and except Assistant Managers and persons above the rank of Assistant Manager" (40 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	31
Number of spoiled ballots	1
Number of ballots marked against respondent	30

0740-96-R: Ms. Heather May (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Respondent) v. C.D. Baker Pharmacy Ltd. c.o.b. as Shoppers Drug Mart (Intervener)

Unit: "all employees of Katalin Lanczi Pharmacy Ltd. c.o.b. as Shoppers Drug Mart at 275 Eramosa Road in the City of Guelph, save and except Assistant Manager, persons above the rank of Assistant Manager, Merchandising Manager, Pricing Systems Manager, Head Cashier, Pharmacists and office and clerical staff" (24 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	21
Number of ballots segregated and not counted	0

0758-96-R: Denise Jewell (Applicant) v. Hospitality, Commercial & Service Employees Union Local 73 (Respondent) (*Dismissed*)

0786-96-R: Milton Fraser, on his own behalf and on behalf of a group of employees of Multicraft Holdings Ltd. (Applicant) v. Retail Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America (Respondent) v. Multicraft Holdings Ltd. (Intervener)

Unit: "all employees of Multicraft Holdings Ltd. at its location at 2210 Thurston Drive in the City of Ottawa, save and except Managers, persons above the rank of Manager, bookkeeper and office and clerical staff" (7 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	8
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	7

0790-96-R: E. Joseph Sevigny (Applicant) v. United Steelworkers of America (Respondent) v. N.I.M. Disposals Limited and Mid-North Iron and Metals Limited and Northerland Iron and Metals Limited (Intervener)

Unit: "all employees of N.I.M. Disposals Limited, Mid-North Iron And Metals Limited, c.o.b. as Northland Iron And Metals Limited in the Regional Municipality of Sudbury, save and except Supervisors, persons above the

rank of Supervisor, office, clerical and sales staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of respondent	13
Number of ballots marked against respondent	8
Number of ballots segregated and not counted	3

0871-96-R: Stephen Grainger (Applicant) v. Christian Labour Association of Canada (Respondent) v. The Ontario Club (Intervener)

Unit: "all employees of The Ontario Club, save and except supervisors, office and clerical staff" (36 employees in unit) (*Granted*)

1010-96-R: Norm Draker (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) (*Withdrawn*)

1063-96-R: Employees of Allied Conveyors Ltd. (Applicant) v. Local 2784 of the United Steelworkers of America (Respondent) v. Allied Conveyors Ltd. (Intervener) (*Dismissed*)

1122-96-R: Gary G. Premo (Applicant) v. United Transportation Union (Respondent) v. Algoma Steel Inc. (Intervener) (*Granted*)

1156-96-R: Lisa Daudelin, on behalf of a group of employees (Applicant) v. United Food & Commercial Workers, Local 206 chartered by the United Food and Commercial Workers International Union, AFL, CIO-CLC (Respondent) (*Granted*)

1195-96-R: George S. Fager (Applicant) v. C.A.W. Local 1256 (Respondent) (*Dismissed*)

APPLICATIONS FOR DIRECTION RESPECTING UNLAWFUL LOCKOUT

0781-96-U: United Food & Commercial Workers International Union, Soft Drink Workers Joint Local Executive Council (Applicant) v. Coca-Cola Bottling Ltd. (Respondent) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

4288-93-U: The United Food and Commercial Workers International Union, Local 175 (Applicant) v. 888538 Ontario Limited, Operating as Holiday Inn, Owen Sound and Raja Chopra and "Kelly" Chopra (Respondents) (*Withdrawn*)

3529-94-U: Irene E. O'Brien, Marie Pemberton, Joy B. Bailey, Jack R. Bailey, Lorne H. Switzer and Joan Shelley (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Crown in Right of Ontario, represented by the Management Board of Cabinet (Intervener) (*Dismissed*)

1291-95-U: Canadian Union of Public Employees, Local 3791 (Applicant) v. The Brotherhood Foundation c.o.b. as The Wexford (Respondent) (*Withdrawn*)

1446-95-U: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Culliton Brothers Limited (Respondent) (*Granted*)

1542-95-U: Grace Sage (Applicant) v. Canadian Union of Public Employees Local 1263 (Respondent) (*Dismissed*)

2251-95-U: The Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses, Waterloo Region Branch (Respondent) (*Withdrawn*)

2416-95-U: Adem Hamdic (Applicant) v. International Brotherhood of Electrical Workers, Local 1788 (Respondent) v. Ontario Hydro (Intervener) (*Dismissed*)

2614-95-U: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Diplock Floor Ltd. (Respondent) (*Withdrawn*)

3053-95-U: Helen Lee (Applicant) v. Canadian Union of Public Employees, Local 1 (Respondent) v. Toronto Electric Commissioners ("Toronto Hydro") (Intervener) (*Withdrawn*)

3083-95-U: Angelo DiPasquale (Applicant) v. Metropolitan Toronto Civic Employees Union, Local 43 (Respondent) v. The Municipality of Metropolitan Toronto (Intervener) (*Withdrawn*)

3452-95-U: Richard Daniels (Applicant) v. Leah Casselman (Respondent) v. The Niagara Parks Commission (Intervener) (*Dismissed*)

3514-95-U: Victor Volpe (Applicant) v. Bakery, Confectionery and Tobacco Workers International Union, Local 426 (Respondent) v. Christie Brown & Co., a Division of Nabisco Ltd. (Intervener) (*Endorsed Settlement*)

3580-95-U: Francisco J. Arias (Applicant) v. United Rubber, Cork, Linoleum and Plastic Workers of America, Local 232 (Respondent) v. Goodyear Canada Inc. (Intervener) (*Dismissed*)

3658-95-U: Dorington Smith (Applicant) v. United Brotherhood of Carpenters and Joiners of America (Respondent) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener) (*Dismissed*)

3899-95-U: Allan MacDonald, Mike Jones and David Baillie (Applicants) v. Canadian Security Union, Local 333 United Food and Commercial Workers Union (Respondent) (*Dismissed*)

3910-95-U: The Ontario Nurses' Association (Applicant) v. Centenary Health Centre (Respondent) (*Withdrawn*)

3930-95-U: Marcel Burden (Applicant) v. Teamsters' Union Local No. 91 (Respondent) v. National Grocers Co. Ltd. (Intervener) (*Dismissed*)

3964-95-U: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. Colonial Furniture (Ottawa) Limited, Vicky Demers, Terry Pleau and Paul Boileau (Respondents) (*Withdrawn*)

4001-95-U: International Union of Bricklayers and Allied Craftsmen, Local No. 6 (Applicant) v. Tom T. Carpet & Ceramic, D & T Tile Ltd., D & T Val - Tile Inc., D & T Floor Coverings Inc. (Respondents) (*Withdrawn*)

4096-95-U: Robert LeClair (Applicant) v. The Crown in Right of Ontario as represented by the Ministry of Community and Social Services (Respondent) (*Withdrawn*)

4116-95-U: Robert H. Bricker (Applicant) v. Harry Holloway, Jerry Wilson, Tom Keagan and International Brotherhood of Electrical Workers, Local 804 (Respondents) (*Dismissed*)

4195-95-U: Dino Phillip Corbi (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

0003-96-U; 0226-96-U; 0389-96-U: Wayne Barnes (Applicant) v. Wackenhut of Canada (Respondent) v. United Food and Commercial Workers International Union, Local 333 (Canadian Security Union) (Intervener); Wayne Barnes (Applicant) v. Canadian Security Union and Wackenhut of Canada (Respondents) (*Dismissed*)

0056-96-U: Ward Clerks Employed at Grace Hospital, Windsor, Ontario (Applicant) v. Service Employees Union, Local 210, Windsor, Ontario (Respondent) v. Hotel-Dieu Grace Hospital (Intervener) (*Withdrawn*)

- 0111-96-U:** The Halton Instructional Assistants Association (Applicant) v. The Halton Board of Education (Respondent) (*Withdrawn*)
- 0120-96-U:** Faiz Bhuiyan - Delta Chelsea Inn (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) (*Dismissed*)
- 0144-96-U:** Raymond Tone (Applicant) v. Ontario Public Service Employees Union (OPSEU) (Respondent) (*Withdrawn*)
- 0169-96-U:** Daniel Ross Cummings (Applicant) v. GSW Heating Products Company and USWA Local 13704 (Respondents) (*Withdrawn*)
- 0179-96-U:** Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Applicant) v. TTI Industrial Division of 1154592 Ontario Inc. (Respondent) (*Withdrawn*)
- 0193-96-U:** Nick Skembaris (Applicant) v. ITT Milrod (Division of ITT Industries of Canada Ltd.) (Respondent) (*Withdrawn*)
- 0223-96-U:** Larry Stempein (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Crown in Right of Ontario (Ministry of Consumer and Commercial Relations) (Intervener) (*Dismissed*)
- 0265-96-U:** Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O., and C.L.C. (Applicant) v. Robin's Foods Inc. (Respondent) (*Withdrawn*)
- 0438-96-U:** Jamie Vicchiarelli (Applicant) v. LOF Glass of Canada Ltd., CAW Local 2225 (Respondents) (*Withdrawn*)
- 0474-96-U:** Niagara Health Care & Service Workers Union Local 302 affiliated with the Christian Labour Association of Canada (Applicant) v. Chippawa Place Retirement Home (Respondent) (*Withdrawn*)
- 0524-96-U:** Costa Building Supplies (Applicant) v. Labourers' International Union of North America, Local 506 (Respondent) (*Withdrawn*)
- 0526-96-U:** Bakery, Confectionery and Tobacco Workers' International Union, Local 264 (Applicant) v. Delta Beverages Inc. (Respondent) (*Withdrawn*)
- 0542-96-U:** United Food and Commercial Workers International Union, Local 175/633 (Applicant) v. K-Mart Canada Limited (Respondent) (*Terminated*)
- 0543-96-U:** Richard William Parrott (Applicant) v. London & District Service Workers' Union Local 220 (Respondent) v. Tillsonburg Hospital (Intervener) (*Dismissed*)
- 0545-96-U:** Marc R. Marchese (Applicant) v. Office & Professional Employees International Union, Local 131 (Respondent) v. Tele-Direct (Publications) Inc. (Intervener) (*Dismissed*)
- 0558-96-U:** Canadian Union of Public Employees, Local 1600 (Applicant) v. The Board of Management for The Metropolitan Toronto Zoo (Respondent) (*Withdrawn*)
- 0584-96-U:** Ontario Nurses' Association (Applicant) v. Brant County Board of Health (Respondent) (*Withdrawn*)
- 0586-96-U:** Chris Laskey and Terrance W. Trenholm (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Respondent) (*Withdrawn*)
- 0607-96-U:** The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the United Association of Journeymen

and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local 663 (Applicant) v. Augment Services Ltd. (Respondent) (*Withdrawn*)

0620-96-U: Daniel S. Petoran (Applicant) v. C.A.W. Local 444, Chrysler Canada Limited (Respondents) (*Withdrawn*)

0653-96-U: Local 280 of the International Beverage Dispensers & Bartenders Union of the Hotel & Restaurant Employees' & Bartenders International Union (Applicant) v. 1153411 Ontario Inc. carrying on business as The Wheat Sheaf (Respondent) (*Terminated*)

0660-96-U: David J. Soulliere (Applicant) v. U. E. Stamping Limited (Respondent) (*Dismissed*)

0682-96-U: Christian Labour Association of Canada (Applicant) v. The Mandarin Restaurant, Burlington (Respondent) (*Withdrawn*)

0698-96-U: Ideal Railings Limited (Applicant) v. Carpenters & Allied Workers, Local 27; United Brotherhood of Carpenters & Joiners of America; Lister Tennant, c/o Carpenters Union Local 27; Chris Thurrott, Business Representative, Toronto-Central Ontario Building & Construction Trades Council (Respondents) (*Withdrawn*)

0711-96-U; 0752-96-U: Canadian Union of Public Employees Local 3389 (Applicant) v. Parisien Manor Nursing Home (Respondent) (*Withdrawn*)

0712-96-U: Robert Wayne Hooey (Applicant) v. Amalgamated Transit Union Local 113 (Respondent) v. The Toronto Transit Commission (Intervener) (*Dismissed*)

0713-96-U: Scott Roberts (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Crown in Right of Ontario (as represented by Management Board of Cabinet) (Intervener) (*Withdrawn*)

0723-96-U: All parties named on Schedule "A" (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

0749-96-U: Union of Needletrades, Industrial and Textile Employees (Applicant) v. U.S.E. Hickson Products Ltd. (Respondent) (*Withdrawn*)

0753-96-U: United Steelworkers of America (Applicant) v. Meadowcroft Place (York Mills) Limited, Execu-Care Nursing Services Limited and 5M Management Services Limited (Respondent) (*Withdrawn*)

0766-96-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Titan Tool & Die Ltd. (Respondent) (*Withdrawn*)

0811-96-U: Patricia Gaudet (Applicant) v. Ontario Nurses' Association Local 69 (Respondent) (*Withdrawn*)

0844-96-U: Mary Lou Ayotte (Applicant) v. CAW/TCA Canada Local 525 (Respondent) (*Withdrawn*)

0847-96-U: United Steelworkers of America (Applicant) v. Concord Elevator Inc. (Respondent) (*Withdrawn*)

0852-96-U: Teamsters Local Union 419 (Applicant) v. Serca Foodservice Inc. (Respondent) (*Dismissed*)

0868-96-U; 1102-96-U: Canadian Union of Postal Workers (Applicant) v. Mister Gallant Services Ltd. and Windsor Proclean Services Inc. (Respondents); Canadian Union of Postal Workers (Applicant) v. Windsor Proclean Services Inc. and Daniel Parson (Respondent) (*Withdrawn*)

0873-96-U: IWA-Canada, Local 1000 (Applicant) v. Tembec Forest Products (1990) Inc. (Respondent) (*Withdrawn*)

0880-96-U: Roy Somir (Applicant) v. United Brotherhood of Carpenter and Joiners of America, Local 1072 (Respondent) (*Dismissed*)

0890-96-U: Canadian Union of Operating Engineers and General Workers (Applicant) v. Value Village Stores Ltd. (Respondent) (*Withdrawn*)

0895-96-U: Vittoria Amato (Applicant) v. Retail, Wholesale Canada Canadian Service Sector Division of United Steelworkers of America (Respondent) v. The Great Atlantic and Pacific Company of Canada, Limited (Intervener) (*Withdrawn*)

0923-96-U: Ontario Public Service Employees Union (Applicant) v. Community Living Huronia (Respondent) (*Withdrawn*)

0924-96-U: United Steelworkers of America (Applicant) v. Metro Taxi Ltd. c.o.b. as Capital Taxi (Respondent) (*Withdrawn*)

0930-96-U: Communications, Energy and Paperworkers Union of Canada and its Local 333 (Applicant) v. HGC Management Inc. (Respondent) (*Withdrawn*)

0940-96-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. BIW Cable Systems Ltd-Canada (Respondent) (*Withdrawn*)

0944-96-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-CANADA) (Applicant) v. Comptec Sales & Service (Respondent) (*Withdrawn*)

0976-96-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Olympus Plastics Ltd. (Respondent) (*Withdrawn*)

0986-96-U: Subramaniam Nadason (Applicant) v. S.E.I.U. (Respondent) (*Dismissed*)

0987-96-U: Negash Getahum (Applicant) v. Hotels & Restaurant Union Local #75 (Respondent) (*Dismissed*)

0999-96-U: Firoz Ramji (Applicant) v. Westbury Howard Johnson Plaza Hotel (Respondent) (*Dismissed*)

1008-96-U: Graphic Communications International Union, Local 100-M (Applicant) v. Versatel Corporation Services Limited and Hartley Gibson Company Limited (Respondents) (*Withdrawn*)

1011-96-U: Public Service Alliance of Canada (Applicant) v. James Bay General Hospital (Respondent) (*Withdrawn*)

1015-96-U: Jim Glenny, Margaret Faraci, Paul Smithson, Nazma Dusruth, Cathy Passaretti, Ralph Schnurpel, Darlene Davies, et al. (Applicant) v. David Rapaport, Regional Vice President O.P.S.E.U. Region 5, Jean Guglietti, President, O.P.S.E.U., Local 520, Donald Ball (Respondents) (*Dismissed*)

1052-96-U: Sofia Matlis (Applicant) v. Metro Orthopaedic Rehab Clinics, Rosemount Doctor Clinic (Respondents) (*Dismissed*)

1055-96-U: Michael B. Myers (Applicant) v. I.W.A. Local 1-500 (Respondent) (*Dismissed*)

1060-96-U: William Davidson, Jose Millare and John Campbell (Applicants) v. Stan Henderson, UFCW-Local 114P (Respondent) (*Dismissed*)

1218-96-U: Les Gondor (Applicant) v. Ontario Public Service Employees Union and O.P.S.E.U. Local 520 (Respondents) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

0751-96-M: Canadian Union of Public Employees Local 3389 (Applicant) v. Parisien Manor Nursing Home (Respondent) (*Withdrawn*)

0856-96-M: Power Worker's Union - Canadian Union of Public Employees, Local 1000 and J. Caskanette, G.D. Chaffey, M.D. Collins, L. Crausen, H.R. Gillies, R.C. Hansen, G. O'Donnel, J. Stark, R. Thoms, H. Tomsett, and R.R. Young on their own behalf and on behalf of all member of International Brotherhood of Electrical Workers, Local Union 1788 (Applicants) v. International Brotherhood of Electrical Workers, Ken Woods, Allan Diggon, Tom McGreevy and International Brotherhood of Electrical Workers, Local Union 1788 by its Trustee, International Brotherhood of Electrical Workers and Ontario Hydro and Electrical Power Systems Construction Association (Respondents) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0935-96-M: Ventrtech Limited (Applicant) v. Ventrtech Employees' Association (Respondent) (*Granted*)

1048-96-M: Canadian Linen Supply Co. Limited (Ottawa) (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

3501-95-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 508 (Applicant) v. Jaddco Anderson Limited, Labourers' International Union of North America, Local 1036 (Respondents) (*Granted*)

4092-95-JD: Iron Workers District Council of Ontario International Association of Bridge, Structural and Ornamental Iron Workers, Local 786 (Applicant) v. Nicholls-Radtke Ltd. and Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 628 (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2169-95-M: Canadian Union of Public Employees and its Local 167 (Applicant) v. The Corporation of the Town of Flamborough (Respondent) (*Terminated*)

4156-95-M: James Bay General Hospital (Applicant) v. Public Service Alliance of Canada (Respondent) (*Withdrawn*)

0211-96-M: Soft Drink Workers Joint Local Executive Council, United Food and Commercial Workers International Union (Applicant) v. Pepsi-Cola Canada Beverages (Ottawa), a division of Pepsi-Cola Canada Ltd. (Respondent) (*Withdrawn*)

0483-96-M: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ideal Railings Limited (Respondent) (*Withdrawn*)

1133-96-M: Ontario Public Service Employees Union (Applicant) v. Cerminara Boys' Residence Inc. (Respondent) (*Granted*)

1183-96-M: Canadian Union of Public Employees, Local 3685 (Applicant) v. Halton Roman Catholic Separate School Board (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

4366-94-OH: Ruth Kidane (Applicant) v. Centro Donne Inc. (Respondent) (*Dismissed*)

0570-95-OH: William A. Perry (Applicant) v. Ontario Hydro (Respondent) (*Dismissed*)

4150-95-OH: Jude Byrne (Applicant) v. Dan Sartor (Respondent) (*Terminated*)

0546-96-OH: John Neil (Applicant) v. Richard Wagner (owner) c/o Royal Auto Body (Respondent) (*Withdrawn*)

0623-96-OH: Jude Byrne (Applicant) v. Jim Gillies, Dan Sartor (Metro Works) (Respondent) (*Terminated*)

0697-96-OH: Hugo Rene Paiz (Applicant) v. Al's Waste Control Inc. (Respondent) (*Granted*)

0782-96-OH: Lorne Sisson (Applicant) v. Business Cards Tomorrow (Respondent) (*Withdrawn*)

0789-96-OH: Manawar Khan (Applicant) v. Shepherd Products (Respondent) (*Withdrawn*)

0910-96-OH: Robert McKenzie (Applicant) v. Alcos Machinery (Respondent) (*Withdrawn*)

0920-96-OH: Jude Byrne (Applicant) v. Jim Gilles (Respondent) (*Dismissed*)

0992-96-OH: Benjamin (Ben) Sarmiento (Applicant) v. ADH Custom Metal Fabricators Inc. (Respondent) (*Dismissed*)

1134-96-OH: Bryan J. Connell (Applicant) v. Clayton Robertson and Chemlawn, Cambridge Branch (Respondent) (*Withdrawn*)

HOSPITAL LABOUR DISPUTES ARBITRATION ACT (Unfair Labour Practice)

0659-96-U: The Ontario Nurses' Association (Applicant) v. Community Life Care Inc., c.o.b. as Community Nursing Home, Port Perry (Respondent) (*Withdrawn*)

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

0568-96-M: The Crown in Right of Ontario as represented by Management Board of Cabinet (Applicant) v. Professional Engineers and Architects of the Ontario Public Service (P.E.G.O) (Respondent) (*Granted*)

CONSTRUCTION INDUSTRY GRIEVANCES

1860-93-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Hudson's Bay Company and Zellers Inc. (Respondents) (*Withdrawn*)

1753-94-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. C & D Services, A Division of 795150 Ontario Inc., 874113 Ontario Inc. c.o.b. as Central Power Systems, R & B Electric, Dent Enterprise, Blaine Hawkins, Bonnie McCoy, Falco Electric Limited, L & L Services and, Fern Laurin (Respondents) (*Granted*)

4589-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Rocket Plumbers Limited, Velco Contracting, Velco Plumbing Ltd., Vaelco Plumbing Ltd., Velco Plumbers Ltd. (Respondents) (*Dismissed*)

0529-95-G; 0530-95-G; 0531-95-G; 0532-95-G; 0534-95-G; 0535-95-G: Labourers' International Union of North America, Local 506 (Applicant) v. Moon Demolition Limited (Respondent); Labourers' International Union of North America, Local 506 (Applicant) v. Greenspoon Brothers Ltd. (Respondent); Labourers' International Union of North America, Local 506 (Applicant) v. Teperman & Sons Limited (Respondent); Labourers' International Union of North America, Local 506 (Applicant) v. Environmental Abatement Services (Respondent); Labourers' International Union of North America, Local 506 (Applicant) v. Delsan Demolition Inc. (Respondent); Labourers' International Union of North America, Local 506 (Applicant) v. Samway Limited (Respondent) (*Granted*)

0635-95-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Ellis-Don Construction Ltd. (Respondent) (*Withdrawn*)

0974-95-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Ellis-Don Construction Ltd. (Respondent) (*Withdrawn*)

1141-95-G: International Brotherhood of Painters and Allied Trades, Local 1891 and the International Brotherhood of Painters and Allied Trades, District Council 46 (Applicant) v. New Generation Drywall Inc., Marin Contracting Ltd. and Mamar Contracting Inc. (Respondents) (*Withdrawn*)

1841-95-G; 1843-95-G: Labourers' International Union of North America, Local 247 (Applicant) v. Ellis-Don Limited (Respondent) (*Withdrawn*)

1874-95-G: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. M.D.B. Mechanical Contractors, M.D.B. Mechanical Contractors Inc., Select Plumbing & Heating Inc. (Respondent) (*Withdrawn*)

2320-95-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2050 (Applicant) v. Toronto Dominion Bank (Respondent) (*Granted*)

2670-95-G: International Union of Operating Engineers, Local 793 (Applicant) v. Elirpa Construction & Materials Limited (Respondent) (*Withdrawn*)

2944-95-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Laurier Electric Limited (Respondent) v. International Brotherhood of Electrical Workers Construction Council of Ontario (Intervener) (*Dismissed*)

2979-95-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Lisi Brothers Construction Ltd. (Respondent) (*Granted*)

3074-95-G: Sheet Metal Workers International Association, Local 537 (Applicant) v. E.S. Fox Limited (Respondent) (*Withdrawn*)

3936-95-G: Labourers' International Union of North America, Local 527 (Applicant) v. Eton Construction Ltd. (Respondent) (*Withdrawn*)

3946-95-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Bona Building & Construction Ltd. (Respondent) (*Withdrawn*)

4003-95-G: International Union of Bricklayers & Allied Craftsmen Local No. 6 (Windsor) (Applicant) v. Tom T. Carpet & Ceramic, D & T Tile Ltd., D & T Val - Tile Inc., D & T Vibra Tile Ltd., D & T Floor Coverings Inc. (Respondents) (*Withdrawn*)

4062-95-G; 4063-95-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. 763790 Ontario Inc. c.o.b. as Can Tech Forming (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener); United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. 889459 Ontario Inc. c.o.b. as Deck Wall Forming (Respondent) (*Withdrawn*)

4202-95-G: Labourers' International Union of North America, Local 527 (Applicant) v. Eton Construction Ltd. (Respondent) v. Iron Workers District Council of Ontario and International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Intervener) (*Withdrawn*)

0382-96-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Vision Almet Limited (Respondent) (*Withdrawn*)

- 0392-96-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. Equicon Engineering Limited (Respondent) (*Withdrawn*)
- 0411-96-G; 0945-96-G:** Sheet Metal Workers' International Association, Local 235 (Applicant) v. Riverside Aluminum & Building Ltd. (Respondent) (*Withdrawn*)
- 0471-96-G:** International Brotherhood of Painters and Allied Trades, and Glaziers, Local 1819 (Applicant) v. Bramalea Glass & Mirror Limited and Acton Glass & Aluminum Ltd. (Respondents) (*Endorsed Settlement*)
- 0555-96-G:** United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Cesan Mechanical (Respondent) (*Withdrawn*)
- 0595-96-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. New Era Steel Inc. (Respondent) (*Withdrawn*)
- 0600-96-G:** Labourers' International Union of North America, Local 506 (Applicant) v. D.E.M.C.O. and Mr. Fred Mondestre (Respondents) (*Granted*)
- 0615-96-G:** International Brotherhood of Painters and Allied Trades, Local 1832 (Applicant) v. Inter-Provincial Painting Limited (Respondent) (*Withdrawn*)
- 0621-96-G:** Labourers' International Union of North America, Local 183 (Applicant) v. P.G.A. Carpentry Ltd. (Respondent) (*Withdrawn*)
- 0672-96-G:** International Brotherhood of Painters and Allied Trades, Local Union 1795 (Applicant) v. St. Catharines Glass & Mirror (Niagara) Ltd. (Respondent) (*Granted*)
- 0708-96-G:** Sheet Metal Workers' International Association, Local 539 (Applicant) v. 770424 Ontario Limited c.o.b. Royale Construction (Respondent) (*Granted*)
- 0741-96-G:** International Brotherhood of Painters and Allied Trades (Ontario Council) and International Brotherhood of Painters and Allied Trades, Locals 114 and 200 (Applicant) v. Meteor Painters/Contractors (Canada) Ltd. (Respondent) (*Withdrawn*)
- 0813-96-G:** Sheet Metal Workers' International Association, Local 30 (Applicant) v. Provincial Industrial Roofing & Sheet Metal Co. Ltd. (Respondent) (*Granted*)
- 0817-96-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Valvic Masonry Limited (Respondent) (*Withdrawn*)
- 0833-96-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Vantage Electrical Services Inc. (Respondent) (*Granted*)
- 0839-96-G:** Labourers' International Union of North America, Local 183 (Applicant) v. 972132 Ontario Ltd. O/A York Concrete Forming (Respondent) (*Granted*)
- 0877-96-G:** United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicant) v. Sera Construction Ltd. (Respondent) (*Granted*)
- 0878-96-G:** The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Unique Mechanical Inc. c.o.b. as Unique Mechanical Contractors (Respondent) (*Granted*)
- 0886-96-G:** International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicant) v. G & G Masonry Division of 970512 Ontario Inc. (Respondent) (*Endorsed Settlement*)

0887-96-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. D & F Insulation Ltd. (Respondent) (*Granted*)

0893-96-G: Labourers' International Union of North America, Local 183 (Applicant) v. Beltem Contracting Inc. (Respondent) (*Endorsed Settlement*)

0902-96-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Connie Steel Products Ltd. (Respondent) (*Withdrawn*)

0905-96-G: Marble, Tile & Terrazzo Union - Local 31 (Applicant) v. Moscone Tile Ltd. (Respondent) (*Withdrawn*)

0916-96-G: Labourers' International Union of North America, Local 183 (Applicant) v. Cobra Drain & Development Corporation (Respondent) (*Granted*)

0917-96-G: Labourers' International Union of North America, Local 506 (Applicant) v. Rockmount Construction & Masonry (Respondent) (*Granted*)

0936-96-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Torino Drywall (Respondent) (*Withdrawn*)

0938-96-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. 758755 Ontario Ltd. c.o.b. Paragon Drywall Service and Canrose Drywall Company Limited (Respondent) (*Endorsed Settlement*)

0939-96-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Oakdale Drywall (Respondent) (*Endorsed Settlement*)

0946-96-G: International Brotherhood of Painters and Allied Trades, District Council 46 (Applicant) v. Joe Capone's Painting & Decorating Ltd. (Respondent) (*Granted*)

0957-96-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Denham Masonry Limited (Respondent) (*Withdrawn*)

1005-96-G: International Union of Bricklayers and Allied Craftworkers Local #1 Ontario (Applicant) v. Tiger Masonry Contractors Ltd. (Respondent) (*Granted*)

1021-96-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Industrial Commercial Insulation & Contracting (Sault) Ltd. (Respondent) (*Granted*)

1023-96-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. All Ports Insulation & Asbestos Service Ltd. (Respondent) (*Granted*)

1028-96-G: International Union of Bricklayers and Allied Craftworkers Local 2, Toronto, Barrie, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers (Applicant) v. Canadian Airseal Insulation Ltd. (Respondent) (*Granted*)

1041-96-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cooper Corporation Limited (Respondent) (*Withdrawn*)

1065-96-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. C.P.L. Drywall & Acoustics Ltd. (Respondent) (*Granted*)

1079-96-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Buttcon Limited (Respondent) (*Withdrawn*)

1092-96-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Centennial Electric Limited (Respondent) (*Endorsed Settlement*)

1095-96-G; 1096-96-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Power Station Construction (A Division of 1096748 Ltd.) (Respondent); International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Standard Underground High Voltage Ltd. (Respondent) (*Withdrawn*)

1106-96-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Walters & SCI Construction Canada Ltd. (Respondent) (*Withdrawn*)

1107-96-G: Labourers' International Union of North America, Local 1036 (Applicant) v. Davy Sheaffer Townsend Ltd. (Respondent) (*Granted*)

1144-96-G: Labourers' International Union of North America, Local 183 (Applicant) v. Elmroad Construction Limited (Respondent) (*Granted*)

1145-96-G: Labourers' International Union of North America, Local 183 (Applicant) v. Elmford Construction Company Ltd. (Respondent) (*Granted*)

1149-96-G: International Union of Operating Engineers, Local 793 (Applicant) v. Elmroad Construction Co. Limited (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2712-90-M; 0791-91-M; 0602-92-M: York University Staff Association (Applicant) v. York University (Respondent) (*Dismissed*)

2457-94-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Ron Sayers Plastering & Drywall Ltd. (Respondent) (*Dismissed*)

0559-95-OH: Rudolf F. Papp (Applicant) v. Chedoke McMaster Hospitals (Respondent) (*Denied*)

3172-95-U: Mrs. E. A. Valeri (Applicant) v. Canadian Union of Public Employees (Respondent) v. Scarborough General Hospital (Intervener) (*Dismissed*)

3318-95-G: Labourers' International Union of North America, Local 183 (Applicant) v. Porto Santo Bricklayers (Respondent) (*Dismissed*)

3361-95-R: Terry Pleau, on his own behalf and on behalf of a group of employees of Colonial Furniture Company (Ottawa) Ltd. (Applicant) v. Retail, Wholesale/Canada, C.S.S.D. of the U.S.W.A. (Respondent) v. Colonial Furniture Company (Ottawa) Ltd. (Intervener) (*Withdrawn*)

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